

FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION



APRIL 1989
Volume 11
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DECISIONS

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APRIL 1989

Review was granted in the following cases during the month of April:

Kenneth Howard v. B & M Trucking Co., Docket No. KENT 89-2-D. (Judge Melick, Dismissal of February 27, 1989)

Secretary of Labor, MSHA v. Coal Junction Coal Co., Docket No. PENN 88-260. (Chief Judge Merlin, Dismissal of February 27, 1989)

Secretary of Labor, MSHA v. Camp Fork Fuel Company, Docket No. KENT 88-178. (Chief Judge Merlin, Settlement of March 15, 1989)

Cyprus Empire Corporation v. Secretary of Labor, MSHA, Docket No. WEST 88-250-R, etc. (Judge Morris, March 20, 1989)

Review was denied in the following case during the month of April:

Arnold Sharp v. Big Elk Creek Coal Company, Docket No. KENT 88-165-D. (Judge Koutras, March 20, 1989)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 4, 1989

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
on behalf of ROGER LEE :
WAYNE, SR. :
v. : Docket No. WEVA 87-89-D
CONSOLIDATION COAL COMPANY :
:

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Backley, Doyle, Lastowka and Nelson, Commissioners

This proceeding concerns a discrimination complaint filed by the Secretary of Labor on behalf of Roger Lee Wayne, Sr., pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act" or "Act"). The complaint alleges that Consolidation Coal Company ("Consol") violated section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c), when it denied Wayne the opportunity to participate in a post-inspection conference without a loss of pay. 1/

1/ Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's

Commission Administrative Law Judge Avram Weisberger found that Consol discriminated against Wayne in violation of section 105(c)(1) and ordered Consol to reimburse Wayne for pay that Wayne lost as a result of Consol's action. The judge also assessed Consol a civil penalty of \$300 for the violation. 9 FMSHRC 1958 (November 1987)(ALJ). The Commission granted Consol's petition for discretionary review. For the reasons that follow, we reverse the judge's decision.

The essential facts are not in dispute. Wayne is a first class mechanic employed on the day shift at Consol's Ireland Mine, an underground coal mine located in Moundsville, West Virginia; he is a member of the United Mine Workers of America ("UMWA" or "union"). At the time of the events herein he was a member of the union safety committee at the Ireland mine.

A mandatory safety standard requires that the Secretary approve and the operator adopt a ventilation system and methane and dust control plan suitable to the conditions and mining system of each underground coal mine. 30 C.F.R. § 75.316 specifies that such plan "be reviewed by the operator and the Secretary at least every 6 months." In preparation for this mandated review, David Wolfe, an inspector and mine ventilation specialist of the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a ventilation inspection at the mine from March 3 through March 6, 1986, in order to determine whether the mine's approved ventilation system and methane and dust control plan was adequate and suitable under existing mining conditions. Following the inspection, Wolfe arranged with Consol's superintendent of mines for a ventilation plan review meeting to take place at the mine on March 25, 1986.

On March 24, 1986, Hestel Riggle, Consol's safety engineer, told Wayne that the ventilation plan review meeting would be held on the following day. Wayne responded that he would probably go with Riggle to the meeting "because it was my shift." Tr. 84. According to Riggle, the next day and prior to the commencement of the day shift at 8:00 a.m., Wayne informed Riggle that he was to be the representative of the

agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

miners at the meeting. Riggle told Wayne that if he was needed as a walkaround, he would be called to the meeting. Tr. 138; 9 FMSHRC at 1960.

On March 25, Inspector Wolfe arrived at the meeting site at 8:40 a.m. Wolfe noted that among those present from Consol in addition to Riggle were Ray Temley, Mine Foreman; Kye Yavlak, Mine Engineer; Steve Perkins, Environmental Control Specialist; Albert Aloio, Assistant Mine Superintendent; and George Carter, Supervisor of Industrial and Employee Relations. Among those present for the miners were: David Shreve, UMWA International Safety Representative, and Bill Wise, Leo Conner, and David Miller, members of the union safety committee.

Riggle asked Inspector Wolfe if a walkaround representative was needed at the meeting. 2/ Wolfe responded that one was not needed as the miners already had sufficient representatives. 9 FMSHRC at 1960.

2/ The term "walkaround" is used for convenience in reference to the rights granted miners' representatives under section 103(f) of the Mine Act, which provides:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this [Act].

30 U.S.C. § 813(f).

Miller then requested of Carter that Wayne attend the meeting as the designated representative of the miners. 3/ Wolfe said that a walkaround was not necessary at the meeting because the meeting was not an inspection. Id. Carter then told Miller that Wayne could be brought out of the mine but only on "union business." 4/ Miller then insisted that Wayne be notified to attend the meeting and Wayne was so notified. Before he could arrive at the meeting site, however, both sides had requested and obtained from Wolfe a postponement of the meeting. When Wayne arrived at the meeting site, he was told by Carter that because he had been called out of the mine on union business, he could not return to work.

When Consol refused to pay Wayne for the remainder of his shift, Wayne filed a complaint with the Secretary alleging discrimination under section 105(c)(1) of the Act. Following an investigation by MSHA, the Secretary filed with the Commission the discrimination complaint on Wayne's behalf that is the subject of the present proceeding. The UMWA intervened in support of Wayne and after an evidentiary hearing on the merits, the judge issued his decision finding a violation by Consol of section 105(c).

The administrative law judge concluded that the ventilation plan review meeting was a "post-inspection conference" within the purview of section 103(f) of the Act. 9 FMSHRC at 1962. The judge further concluded that Wayne was the "authorized representative" of the miners for participation in the March 25 conference and that his participation in the conference was protected under section 105(c) of the Mine Act. The judge noted the parties' stipulation that the safety committeeman who was on the shift at the time of the post-inspection conference would be the first choice as the authorized representative of the miners on that shift; that Wayne, a safety committeeman, was working on the shift during which the meeting occurred; and that Miller had requested that Wayne be present at the meeting as the designated representative of the miners. The judge concluded that although three other safety committeeman were already at the meeting, Wayne was the "authorized" representative of miners within the purview of section 103(f) of the Act. 9 FMSHRC at 1962.

The judge also found that Wayne's loss of pay constituted an adverse action and that Carter's refusal to allow Wayne to return to work after the meeting had been postponed was an attempt to punish Wayne for attempting to exercise his protected right to attend the meeting. Therefore, the judge held that Consol unlawfully discriminated against Wayne in violation of section 105(c)(1) of the Act when it refused to

3/ At the hearing, the parties stipulated that a safety committeeman working on the shift during which an inspection or conference occurred would be the miners' first choice as the authorized representative of the miners on that shift. See 9 FMSHRC at 1959. Wise, Conner and Miller worked on shifts other than the day shift.

4/ The term "union business" refers to a contractual right to an excused, unpaid leave of absence to participate in union activities.

allow Wayne to return to work or to pay him. 9 FMSHRC at 1962-63.

On review, Consol raises a number of arguments in support of its contention that the judge erred in finding that it unlawfully discriminated against Wayne. Consol argues that the March 25 meeting was not a "post-inspection conference" within the meaning of section 103(f) and, therefore, Wayne's participation in the meeting was not protected activity. Consol also asserts that section 103(f) confers upon the Secretary and her authorized representative wide authority and discretion in interpreting and implementing walkaround rights, and that Inspector Wolfe, acting within that authority, excluded Wayne from walkaround status when he determined that the miners were already adequately represented at the meeting. In this regard, Consol contends that its stipulation that an on-shift safety committeeman is the miners' first choice as the walkaround representative on that shift does not guarantee walkaround status to the on-shift safety committeeman. Because Wayne's presence was determined by the inspector to be superfluous to the other miner representatives who were also present to aid and participate in the six-month ventilation meeting, Wayne was not entitled to be paid by Consol for the remainder of the shift after he exited the mine on union business. Finally, Consol argues that Wayne's right to go on union business and Consol's right to refuse to allow him to return to work or to pay him for the remainder of the shift are controlled by the 1984 Wage Agreement (the "contract").

In response, the Secretary and the UMWA contend that the ventilation review meeting was a "post-inspection conference" under section 103(f), Wayne was the miners' choice as their authorized representative for participating in the conference, the presence at the conference of other members of the union safety committee did not negate Wayne's right to participate in the March 25 meeting without a loss in pay, and that none of Inspector Wolfe's actions can properly deprive Wayne or the miners of their rights.

We conclude the judge erred in finding, under the facts of this case, that Consol discriminated against Wayne in violation of section 105(c)(1). In reaching this conclusion, we need not resolve whether the meeting at issue is a compensable post-inspection conference. Rather, assuming the applicability of section 103(f) to a ventilation review meeting, we find that, given Inspector Wolfe's exercise of his authority under section 103(f), Consol cannot be found to have violated the Act.

Under the Mine Act, a complaining miner establishes a prima facie case of discrimination by proving he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. Thus, to prevail on his complaint, Wayne must first show that he had a protected right to attend the

March 25 meeting.

Section 103(f) affords both representatives of operators and representatives of miners the right to accompany an MSHA inspector during a "physical inspection of [the] ... mine" and to "participate in pre- or post-inspection conferences held at the mine." 30 U.S.C. § 813(f). We have previously emphasized the important function served by these rights in enhancing miners' understanding and awareness of the health and safety requirements of the Act. Emery Mining Corp., 10 FMSHRC 276, 289 (March 1988), petition for review filed Nos. 88-1655 and 1659 (10th Cir. April 27, 1988); Secretary on behalf of Truex v. Consolidation Coal Co., 8 FMSHRC 1293 (September 1986); see also Magma Copper Co., 1 FMSHRC 1948, 1951-52 (December 1979), aff'd, Magma Copper Co. v. FMSHRC, 645 F.2d 694 (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981). We have further recognized that section 103(f) provides miners, rather than mine operators, the right to designate a representative for section 103(f) inspections and conferences. Truex, 8 FMSHRC at 1298. Unlike Truex, however, the controlling question here is not whether the operator has a role to play in the selection of a miners' representative but the extent of the role played by the Secretary's Inspector.

The right of a miners' representative to accompany an inspector is not an unqualified right. Emery, 10 FMSHRC at 289. Section 103(f) itself expressly provides that the exercise of the right is "[s]ubject to regulations issued by the Secretary," requires that a representative "be given an opportunity to accompany" the inspector, and grants the inspector discretion to permit additional representatives where he determines that more than one walkaround representative would aid his inspection. 30 U.S.C. § 813(f). See Emery, 10 FMSHRC at 289.

In exercising the authority granted by section 103(f), the Secretary has recognized that the exercise of the walkaround right by miners' representatives must be the subject of appropriate qualification and she has expressly invested MSHA inspectors with the authority to limit the number of miners' representatives participating in an inspection, consistent with the primary obligation to carry out inspections in a thorough, detailed, and orderly manner. Interpretative Bulletin, 43 Fed. Reg. 17546 (1978). Emery at 289 n. 13. 5/

5/ The Secretary's Interpretative Bulletin setting forth guidelines for the inspector's interpretation and application of section 113(f), provides:

Considerable discretion must be vested in inspectors in dealing with the different situations that can occur during an inspection. While every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed, and orderly inspection. The inspector cannot allow inordinate

Here, it is clear that Inspector Wolfe believed that Wayne's presence as a walkaround was not required at the meeting because the miners already were adequately represented by the three union safety committeemen then present. It is undisputed that Wolfe informed the representatives of the miners already in attendance, as well as Consol's representative, of his position. Consol's safety engineer Riggle testified that had Wolfe stated that he required a walkaround for the meeting, Consol would have made certain that a walkaround was available to the inspector, and the parties do not dispute that Consol's practice is to defer to the MSHA inspector's determination regarding walkaround. Tr. 144, 154.

In view of the central role that inspectors play under the statute and the Secretary's own guidelines with respect to walkaround representation, we hold that the judge erred when he found "no relevance" in Wolfe's "comments" that "a 'walkaround' was not required ... and that the miners were already represented by the three safety committeemen who were present." 9 FMSHRC at 1962. In stating to the representatives of the miners and of Consol already present at the meeting that Wayne's additional presence was not required, Wolfe exercised the discretionary authority accorded him by the Act to determine the composition of the group participating in an inspection. Since three other members of the union safety committee and one representative of the International UMWA were present at the meeting, we cannot say that the inspector acted arbitrarily or capriciously in excluding Wayne.

We have considered the parties' stipulation that the safety committeeman working the shift during which an inspection takes place would be the "first choice" as miners' representative for an inspection occurring during that shift. The statute, however, does not limit walkaround participation to only "on-shift" miners. Instead, the statute requires only that, if an "on-shift" representative participates

as the authorized representative, such representative is to be compensated by the operator. Here, several representatives of miners were present to participate at the meeting and the inspector, acting within his authority, determined that an additional miners' representative was not needed. In the circumstances of this case, the inspector's decision controls.

Accordingly, we find that the inspector acted within the discretion granted him under section 103(f) and the Secretarial guidelines in determining that Wayne's presence was not required at the meeting. We further find that in relying upon the inspector's determination Consol did not violate section 105(c). Therefore, the judge's decision is reversed, the discrimination complaint is dismissed, and the penalty assessed by the judge is vacated.

Richard V. Backley
Richard V. Backley, Commissioner

Joyce A. Doyle
Joyce A. Doyle, Commissioner

James A. Lastowka
James A. Lastowka, Commissioner
L. Clair Nelson
L. Clair Nelson, Commissioner

Chairman Ford concurring in result:

I agree with my colleagues in the majority that the decision of the judge should be reversed, but I would base the reversal on a more fundamental ground: Mr. Wayne's participation in the ventilation plan review meeting of March 25, 1986 was not a statutorily protected activity, the denial of which would constitute a violation of section 105(c) of the Mine Act. 30 U.S.C. 815(c). To the extent that my colleagues decline to reach the issue of whether a miner or miner representative's participation in such a review meeting lies within the "walkaround" right set forth in section 103(f) of the Mine Act, 30 U.S.C. 813(f), I am obliged to file this separate opinion.

It is appropriate to begin an analysis of how this dispute arose by recalling what Inspector Wolfe was doing at the Ireland Mine in March of 1986. He was there to carry out the Secretary's responsibilities under 30 C.F.R. 75.316, which requires that coal mine ventilation plans "be reviewed by the operator and the Secretary at least every six months" (emphasis added). The regulation is drawn verbatim from the Mine Act itself. 30 U.S.C. 863(O). There is simply no regulatory or statutory authority for participation by miners or their representatives in the development, review and approval of mine ventilation plans, however appropriate such participation might be. 1/

The question then becomes whether, despite this lack of authority for miner participation in the plan review and approval process, there exists an overriding right of participation derived from section 103(f) of the Mine Act. That section provides the miners' representative "an opportunity to accompany" the inspector during the physical inspection of the mine and "to participate in pre- or post- inspection conferences held at the mine." The Secretary argues that Inspector Wolfe's ventilation survey conducted on March 3-6, 1986 and the follow-up review meeting held on March 25, 1986 both invoke the "walkaround" right of section 103(f). The Secretary's position on review, however, conflicts with the delineation of section 103(f) rights set forth in the Department of Labor's Interpretative Bulletin (Bulletin) issued April 25, 1978, which is the only official Secretarial pronouncement on the scope of walkaround participation. 43 Fed. Reg. 17546. 2/

1/ The standard also provides that plans be initially "adopted" by the operator and "approved" by the Secretary. Numerous ventilation standards within Part 75, however, do require that records and reports of ventilation examinations conducted to evaluate the effectiveness of the ventilation plan must be made available to "interested persons" which would of course include miners. See, e.g., 30 C.F.R. 75.300-4, 75.303, 75.305 and 75.306. Additionally, 30 C.F.R. 75.1203 requires that a mine map setting forth the ventilation system be kept current and made available to miners and their representatives.

2/ The Bulletin does not address a miners' representative's participation in pre-and post-inspection conferences; rather, it deals with various mine site "activities" giving rise to miners' participation rights. For purposes of analysis here, however, I am assuming that if a right to participate in a particular activity exists, that right extends to any subsequent conference held on mine property to discuss specifically the consequences of that activity.

Stating that "the types of activities which give rise to the [miner's] participation right under section 103(f) are numerous, but not unlimited," the Bulletin proceeds to distinguish those situations where walkaround participation is warranted from those where it is not. Those activities giving rise to the right of participation are: (1) "regular inspections", i.e., the four underground and two surface mine inspections required annually by the Mine Act; (2) "spot inspections", described as inspections made for purposes of determining if an imminent danger or a violation exists; (3) inspections in response to requests from miners or their representatives, i.e., section 103(g) inspections; (4) inspections at mines liberating excessive quantities of methane or other explosive gases, i.e., section 103(i) inspections; and (5) inspections in conjunction with accident investigations. 43 Fed. Reg. 17547-48.

Conversely, activities that do not invoke the right to participation include: (1) technical consultations; (2) demonstration of prototype equipment; (3) education and training services; (4) safety and health research; (5) general information gathering; (6) criminal investigations; (7) investigations of discrimination complaints; (8) investigations into petitions for variances under section 101(c); and (9) field certification of permissible equipment. 43 Fed. Reg. 17548.

Viewed against the backdrop provided by these distinctions, I conclude that the activity engaged in by Inspector Wolfe during his visits to the mine on March 3-6, 1986 was more in the nature of consultation and information gathering in conjunction with the plan review and approval process than in the nature of "direct enforcement activity" described by the Bulletin as "carried out for the purpose of determining if an imminent danger or a violation exists." 43 Fed. Reg., 17547-48. 3/

This is not to say that "direct enforcement activity" could not arise in the course of an activity that would not otherwise invoke a miner representative's right to participate. In fact, Inspector Wolfe issued two

3/ Indeed, the inspector's activities throughout March of 1986 are most analogous to those carried out during investigations into petitions for variance under section 101(c) (number 8 among the list of activities, supra, that do not give rise to miner participation rights). In both cases, the operator's past compliance record is reviewed, whether that review covers compliance with the current plan or compliance with the standard from which a variance is sought. Likewise, in both cases the review covers proposed changes in the operator's compliance responsibilities, whether through revisions to the plan or through the variance being sought. If, as the Secretary argues and the judge found, the discussion of past compliance and changes in future compliance responsibilities are the criteria for determining whether an activity, i.e., the ventilation review meeting, comes within the "purview of section 103(f)", 9 FMSHRC 1962, I fail to see why section 101(c) investigations would not also require walkaround participation.

citations during the March 3-6 survey though neither one related to the ventilation standards or the ventilation plan (nor were the two citations reviewed at the March 25 meeting). The Bulletin, however, anticipates such circumstances by stating that while "enforcement action could result from some of those [non-participation] activities ... [t]he continuing presence of a representative of the miners in all phases of the activities would not necessarily aid the activity" 43 Fed. Reg. 17548.

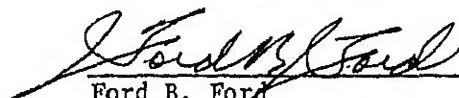
Granting appropriate deference to the Secretary as an interpreter of the enabling statute, I find no basis in her Interpretive Bulletin for considering the mine plan review and approval process as an activity giving rise to section 103(f) participation rights for miners or their representatives. Indeed, the Bulletin taken as a whole supports an opposite view. Nor am I persuaded by the case law advanced by the Secretary in support of her position. In Southern Ohio Coal Co., 8 FMSHRC 295 (March 1986) miner participation at a post-inspection conference was specifically authorized by 30 C.F.R. 100.6 which granted "all parties" the opportunity to review each citation and order issued during a regular quarterly inspection. Id. 296. In Secretary on behalf of Truex v. Consolidation Coal Co., 8 FMSHRC 1293 (March 1988) the operator stipulated that a miner representative's attendance at a conference called to discuss a hearing conservation program was subject to the walkaround requirements of section 103(f). Here, there is neither regulatory authority nor an admission by the operator establishing that the ventilation plan review meeting of March 25, 1986 was subject to the walkaround rights of section 103(f).

In the final analysis the dispute in this case appears to have arisen from the inevitable blurring of miner's rights set forth separately in the Mine Act and in the National Bituminous Coal Agreement of 1984 and in their respective predecessors. Custom and practice at the Ireland Mine have obviously led to some confusion as to where statutory rights terminate and wage agreement rights commence. 4/ As this Commission has often stated, however, "the Mine Act is not an employment statute." United Mine Workers of America on behalf of James Rowe et al. v. Peabody Coal Co., 7 FMSHRC 1357, 1364 (1985) aff'd 822 F.2d 1134 (D.C. Cir. 1987). Great care must therefore be taken by the Secretary and the Commission to keep statutory and contractual rights separate and distinct. Here, regardless of what rights of participation may or may not lie in contract, it is clear to me that neither the Mine Act nor, in particular, standard 30 C.F.R. 75.316 grants miners or their representatives rights to participate in the review and approval of mine ventilation plans. If the Secretary believes that

4/ See, for instance, Article III, section (d)(7) of the wage agreement guaranteeing pay for certain safety committee activities and Article III, section (h) setting forth miners' rights to receive in advance and to comment upon various plans required to be developed and approved under the Mine Act. In fact, the latter provision was invoked by safety committeeman Miller when he requested a 10 day postponement of the March 25, 1986 meeting to allow the union to consider an MSHA-proposed change in the ventilation plan. Tr. 107, 109. Although the plan was ultimately approved, the rescheduled meeting was never held. Tr. 55.

such participation is both vital and appropriate (and sound arguments can be marshalled to support that belief) her recourse is to the rulemaking provisions of section 101 of the Act, not to the discrimination provisions of section 105(c). 5/

For the reasons set forth above I would reverse the decision of the judge and dismiss the complaint.



Ford B. Ford
Chairman

5/ In fact, it should be noted that the scope of miner participation in the development, approval and periodic review of mine plans is a specific consideration in the Secretary's ongoing rulemaking activities. The Secretary's relatively recent revision of her roof control standards does not provide for the participation of miners or their representatives in the development of roof control plans nor in the approval and review process. Plans are to be "developed" by the operators, "approved" by the MSHA District Managers, and "reviewed" every six months by the

Distribution

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Thomas M. Myers, Esq.
United Mine Workers of America
56000 Dilles Bottom
Shadyside, Ohio 43947

Michael Peelish, Esq.
Consolidation Coal Company
1800 Washington Road
Pittsburgh, PA 15241

Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, Virginia 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 7, 1989

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. KENT 88-178
	:	
CAMP FORK FUEL COMPANY	:	

BEFORE: Ford, Chairman; Doyle and Lastowka, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"). Commission Chief Administrative Law Judge Paul Merlin issued a Decision Approving Penalty and Order of Dismissal on March 15, 1989, approving the proposed civil penalty in this matter, stating that it had been paid by the operator, and dismissing the proceeding. The judge previously received a letter from the operator, filed in response to the judge's

On August 22, 1988, the Secretary filed a Proposal for Assessment of Civil Penalty. Camp Fork did not file an answer to the proposal, as it was required to do in order to maintain its contest. See 29 C.F.R. § 2700.28. Accordingly, on December 22, 1988, Judge Merlin issued an Order to Respondent to Show Cause, explaining the requirements for filing an answer and directing the operator to file its answer or show good reason for not doing so within 30 days of the order. By handwritten letter dated January 23, 1989, from Camp Fork's bookkeeper, the operator stated that it disagreed with the citation but felt that it was cheaper to pay the proposed penalty than to litigate over it. Camp Fork asserted that it had paid the penalty by check #12087 on October 9, 1988. There is no indication in the record that a copy of this letter was served upon the Secretary as required, and no response to it from the Secretary appears in the record.

On March 15, 1989, Judge Merlin issued his dismissal order. He approved the \$295 proposed penalty assessment as being consistent with the Mine Act, noted that the operator had paid the proposed penalty, and dismissed the proceeding. On March 24, 1989, counsel for the Secretary filed with the Commission a Motion for Reconsideration, in which counsel states that the Secretary cannot locate any record reflecting payment of the civil penalty. The Secretary seeks reopening of the proceeding and requests that the judge issue an order directing payment of the penalty or submission of proof of payment.

Judge Merlin's jurisdiction in this matter terminated when his dismissal order issued on March 15, 1989. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70. Here, the Secretary's motion is a request for relief from the judge's decision and we will treat it as a timely petition for discretionary review. See, e.g., Secretary on behalf of DeLisio v. Mathies Coal Co., 9 FMSHRC 193, 194 (February 1987).

An operator's payment of a civil penalty extinguishes its right to contest the penalty and the underlying alleged violation, except where payment has been made by genuine mistake. Old Ben Coal Co., 7 FMSHRC 205, 207-10 (February 1985). Such payment would afford a proper basis for dismissal of this proceeding. The Secretary's motion, however, questions the basis upon which the judge's dismissal order rests.

Accordingly, we grant the Secretary's petition for discretionary review, vacate the dismissal order, and remand this matter to the judge for further appropriate proceedings. 1/

Ford B. Ford
Ford B. Ford, Chairman

Joyce A. Doyle
Joyce A. Doyle, Commissioner

James A. Lastowka
James A. Lastowka, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 7, 1989

KENNETH HOWARD

:

:

v.

:

Docket No. KENT 89-2-D

:

B & M TRUCKING

:

BEFORE: Ford, Chairman; Doyle and Lastowka, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), Commission Administrative Law Judge Gary Melick issued an Order of Dismissal on February 27, 1989, finding that complainant Kenneth Howard had failed to respond to an earlier Order to Show Cause and dismissing Howard's discrimination complaint.

Commission received from the attorney represent' Reinstate, asserting that the failure to resp was due to counsel's misunderstanding of that circumstances presented, we deem this r---- petition for discretionary review, which we grant. We vacate the judge's dismissal order, and remand for further proceedings.

On October 3, 1988, Howard, by counsel, filed with the Commission a discrimination complaint alleging that he had been discriminatorily discharged by B&M Trucking ("B&M") in violation of section 105(c) of the Mine Act. 30 U.S.C. § 815(c). 1/ The complaint, as supplemented on October 7, 1988, alleges that Howard, a truck driver, was discharged because he had objected on safety grounds to operating a front end loader that he had not been trained to operate. The complaint requests backpay, reinstatement, punitive damages, and attorney's fees and costs.

1/ Under Commission Procedural Rule 40(b), 29 C.F.R. § 2700.40(b), as amended (52 Fed. Reg. 44882 (November 23, 1987)), a miner may file his own section 105(c)(3) complaint of discrimination for alleged violation of section 105(c) of the Mine Act only if the Secretary of Labor has made a prior determination that no violation of the Act has occurred. See also 30 U.S.C. §§ 815(c)(2) & (3).

In an Order to Show Cause dated December 2, 1988, Commission Chief Administrative Law Judge Paul Merlin observed that Howard had not shown compliance with the Commission's requirements for filing a discrimination complaint pursuant to section 105(c)(3) of the Mine Act and ordered the complainant to file with the Commission a copy of a certified mail return receipt showing delivery of the discrimination complaint to the operator and a copy of the determination letter from the Department of Labor's Mine Safety and Health Administration ("MSHA") finding that a violation of the Mine Act had not occurred. The order directed Howard to send the complaint to the operator, if he had not already done so, along with a note to the operator stating that complainant disagreed with MSHA's determination and was requesting review and relief by the Commission. Howard was ordered to comply with the above requirements within 30 days of the date of the order or to show good reason for failure to do so.

On February 27, 1989, Judge Melick, to whom the matter had been assigned, issued an Order of Dismissal in which he found that complainant had failed to respond to the show cause order. Accordingly, the judge dismissed the discrimination complaint. On March 13, 1989, the attorney for Howard filed with Judge Melick a Motion to Reinstate the discrimination complaint.

Because Judge Melick's jurisdiction in this matter terminated when his dismissal order issued on February 27, 1989, 29 C.F.R. § 2700.65(c), he forwarded the Motion to Reinstate to the Commission's Docket Office, where it was received on March 14, 1989. B&M has not filed a response to this motion. Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70. Here, the Motion to Reinstate is a request for relief from the judge's decision and, under the circumstances presented, we will treat it as a timely-filed petition for discretionary review. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

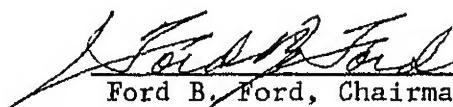
Judge Melick's dismissal of the complaint was based on complainant's default in not responding to the show cause order. The Commission has stated that "in general, if a defaulting party can make a showing of adequate or good cause for the failure to respond to an order, the failure may be excused and appropriate proceedings on the merits permitted." M.M. Sundt Construction Co., 8 FMSHRC 1269, 1271 (September 1986), citing Valley Camp Coal Co., 1 FMSHRC 791, 792 (July 1979). In assessing the existence of adequate cause, explanatory factors akin to those mentioned in Fed. R. Civ. P. 60(b)(1) -- mistake, inadvertence, surprise, or excusable neglect -- may be relevant. Valley Camp, *supra*, 1 FMSHRC at 792 & n. 3. The absence of bad faith on the part of the defaulting party is also a relevant concern. Easton Constr., 3 FMSHRC 314, 315 (February 1981). An attempt to comply at least partially with the order in question may be a mitigating factor as well. Sigler Mining Co., 3 FMSHRC 30 (January 1981).

In this case, Howard's counsel states that the failure to comply with the show cause order was due to her own misunderstanding of the

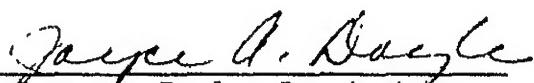
judge's order. The Motion to Reinstate alleges that the complaint was served on B&M within the period required by the show cause order, and the certified mail return receipt is attached to the motion. The complaint also outlines the relief requested. Thus, there is some indication on the record of complainant's attempts to comply with requisite filing requirements and with the show cause order. We are reluctant to impose default by attributing to a party the non-willful errors of its counsel. See, e.g., Jackson v. Beech, 636 F.2d 831, 835-37 (D.C. Cir. 1980).

Although there is not sufficient information on the record to permit us to rule finally on the substantive merits of Howard's motion at this time, we conclude that in the interest of justice, complainant should have the opportunity to present his position to the judge, who shall determine whether final relief from the default order is warranted. See Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986). In connection with further proceedings before the judge, we note that Howard's attorney has not furnished the Commission with a copy of the letter from MSHA indicating its determination that no violation of the Act occurred, or with proof that Howard's supplemental statement filed on October 7, 1988, has been served on the operator.

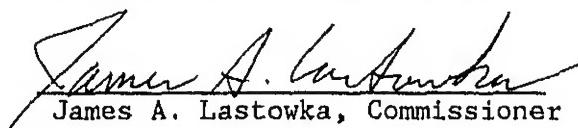
Accordingly, review of the judge's order of dismissal is hereby granted, the order is vacated, and this matter is remanded for further appropriate proceedings. 2/



Ford B. Ford, Chairman



Joyce A. Doyle, Commissioner



James A. Lastowka, Commissioner

2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. § 823(c), we have designated ourselves a panel of three members to exercise the powers of the Commission in this matter.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 7, 1989

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 88-260
	:	
COAL JUNCTION COAL COMPANY	:	

BEFORE: Ford, Chairman; Doyle and Lastowka, Commissioners

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1982) ("Mine Act"), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Dismissal on February 27, 1989, stating that the Commission has been informed by the Secretary of Labor that the proposed civil penalties had been paid by Coal Junction Coal Company ("Coal Junction"). However, in a letter to Judge Merlin dated March 3, 1989, and received by the Commission on March 6, 1989, Coal Junction submitted an Answer to the Secretary's Petition for Assessment of Civil Penalty, which had been filed in August 1988. The Answer indicates that Coal Junction wishes to pursue its contest in this matter. Under the circumstances presented, we deem Coal Junction's Answer to constitute, in effect, a petition for discretionary review, which we grant. The judge's dismissal order is vacated and this matter is remanded for further proceedings.

On April 25 and 26, 1988, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Coal Junction, at its surface coal mine in Pennsylvania, a number of citations for alleged violations of mandatory standards. Coal Junction did not immediately contest the citations. In June 1988, MSHA notified Coal Junction that it proposed civil penalties of \$407 for the alleged violations. In response to this notification, Coal Junction filed with the Commission a "Blue Card" request for a hearing. On August 22, 1988,

the Secretary filed with the Commission a Petition for Assessment of Civil Penalty, and certified that a copy of the petition had been mailed to Coal Junction.

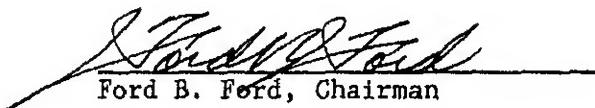
Coal Junction did not file an answer to the Secretary's petition within 30 days, as it was required to do in order to maintain its contest. See 29 C.F.R. § 2700.28. Accordingly, on December 5, 1988, Judge Merlin issued to Coal Junction an Order to Show Cause explaining the requirements for filing an answer to a civil penalty proposal and ordering the operator to file its answer within 30 days or be found in default. No answer or other response to the show cause order was received by the Commission within that time.

On February 9, 1989, MSHA transmitted to the Commission's Docket Office a memorandum indicating, in relevant part, that the proposed civil penalties in this proceeding had been paid by the operator. On February 27, 1989, Judge Merlin issued his dismissal order, based on the information that the civil penalties had been paid. By letter dated March 3, 1989, the attorney for Coal Junction transmitted to the Commission an answer stating that Coal Junction wishes to contest the alleged violations. (The operator's papers do not refer to Judge Merlin's show cause or dismissal orders, do not mention the apparent payment of proposed civil penalties, and do not explain the late filing of the answer.)

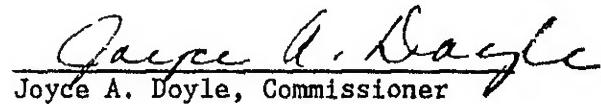
The judge's jurisdiction in this matter terminated upon issuance of his dismissal order. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70. Here, we deem Coal Junction's answer to constitute, in effect, a timely petition for discretionary review of the judge's dismissal order. See, e.g., Middle States Resources, Inc., 10 FMSHRC 1130 (September 1988).

An operator's payment of a civil penalty extinguishes its right to contest the penalty and the underlying violation, except where payment has been made by genuine mistake. Old Ben Coal Co., 7 FMSHRC 205, 207-10 (February 1985). The filing of Coal Junction's answer, albeit late, suggests that, in the interest of justice, the operator should be heard with respect to MSHA's assertion that the penalties have been paid.

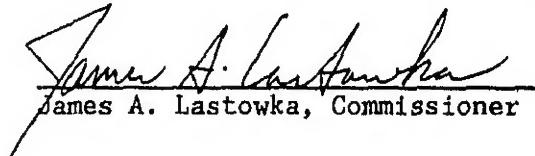
Accordingly, we grant the operator's petition for discretionary review, vacate the dismissal order, and remand this matter to the judge for further appropriate proceedings. 1/



Ford B. Ford
Ford B. Ford, Chairman



Joyce A. Doyle
Joyce A. Doyle, Commissioner



James A. Lastowka
James A. Lastowka, Commissioner

rsuant to section 113(c) of the Mine Act, 30 U.S.C.
(), we have designated ourselves a panel of three members to
the powers of the Commission in this matter.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 24, 1989

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 85-19
	:	
MID-CONTINENT RESOURCES, INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Ford, Backley, Lastowka and Nelson

The issue in this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), is whether the Secretary of Labor ("Secretary") proved the validity of a withdrawal order issued pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b). 1/ The withdrawal order alleges that Mid-Continent

1/ Section 104(b) states:

If, upon any follow-up inspection of a ... mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to [section 104] ... has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary

Resources, Inc. ("Mid-Continent") failed to abate a violation of 30 C.F.R. § 75.1704 within the prescribed period of time. 2/ Commission Administrative Law Judge Michael A. Lasher found that the Secretary did not prove that Mid-Continent failed to abate the violation, and he vacated the section 104(b) withdrawal order. 9 FMSHRC 1757 (October 1987)(ALJ). We granted the Secretary's petition for discretionary review challenging the judge's finding. For the reasons that follow, we affirm.

The events leading to the issuance of the contested withdrawal order occurred in the designated return air escapeway of the 102 Long Wall Panel at Mid-Continent's Dutch Creek No. 1 Mine, an underground coal mine, located at Carbondale, Pitkin County, Colorado. The mine lies under 2000 to 3000 feet of overburden. As a result of pressure from the overburden, the mine has an ongoing problem with floor heave and deterioration of the ribs of mine entries. Man-made pack walls, composed of cement and crushed rock or a crushed limestone mixture, provide support in the entries, including entries serving as escapeways. 3/ Pressure from the overburden causes the pack walls to deteriorate and to buckle. Also, water continually seeps into the mine. As a result, impoundments of water in the escapeways can occur.

On June 20, 1984, Mine Safety and Health Administration ("MSHA") Inspector Louis Villegos inspected the designated return air escapeway of the 102 Long Wall Panel. As Villegos walked the escapeway he saw that the floor had heaved and that a dam composed of rock and mud mixed

determines that such violation has been abated.

30 U.S.C. § 814(b).

2/ 30 C.F.R. § 75.1704, the mandatory underground coal mine escapeways standard, provides in part:

[A]t least two separate and distinct travelable passageways which are maintained to insure passage at all times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked....

ion 75.1704 essentially restates section 317(f)(1) of the Mine Act, S.C. § 877(f)(1).

wall built along the edge of a
it helps to support the roof and also
prevent it spreading onto the
partment of Interior, A Dictionary of
'87 (1968).

with coal had built up to a height of 15 inches. The dam was impounding water at a point approximately 450 feet from the face. The water was up to 12 inches deep and covered the width of the entry. 9 FMSHRC 1760-61.

Because the inspector believed that the impoundment obstructed the escapeway to the extent that passage through the escapeway could not be insured at all times, he issued a citation pursuant to section 104(a) of the Act alleging a violation of section 75.1704, supra. The citation states:

The designated return escapeway from the 102 longwall section was not maintained to insure passage at all times due to the following conditions being present. At a location 450 feet outby the 102 Longwall face, floor material had been pushed up to within 4 feet of the roof forming a bank and a[n] impoundment of water and rock up to 15 inches deep, 6 feet wide and 75 feet in length. No one was observed in the area to correct the condition. Men were at work at the Longwall face.

Exh. P-1. (emphasis added).

Inspector Villegos issued the citation at 5:15 p.m. on June 20. In the citation he fixed the time for abatement of the violation as 9:00 p.m. the same day. Villegos subsequently twice extended the time for abatement, to July 11, 1984, and to July 20, 1984.

Between June 20 and July 25 mining had advanced in the 102 Long Wall Panel. On July 25, 1984, MSHA Inspector Lee H. Smith inspected the same escapeway with MSHA Supervisory Inspector Clarence Daniels and Mine Superintendent Allyn Davis. Smith had discussed the section 104(a) citation with Villegos. Tr. 126-127. Smith was aware that the time had passed for abatement of the violation but had not previously seen the conditions for which the citation was issued.

During inspection of the escapeway Smith observed an impoundment backing up water. In addition, portions of the pack walls in the area of this impoundment had fallen into the escapeway and the mine floor had heaved to within four feet of the roof. Water and mud had accumulated in the impoundment, which was approximately 50 to 70 feet in length by six to 8 feet in width. Smith testified that the water was about 12 inches deep for a distance of at least 20 feet and the heaving problem existed from the water and mud accumulation to within 100 to 150 feet of the face. Tr. 119, 120-22, 154-55. Smith believed that the obstruction in the escapeway represented "an ongoing condition in the area," and that after two extensions of the period of time fixed to abate the violation that the area "was not being cleaned fast enough." Tr. 151.

Smith, after discussions with Daniels and Davis, believed that the obstructed area of the escapeway was the same area cited by Villegos on June 20. Tr. 126. However, at the hearing on the matter, Smith unequivocally testified that in fact the area was not the same.

Tr. 122-23, 140-141, 150-151, 154. 4/

Smith issued to Mid-Continent a section 104(b) withdrawal order stating in part:

The designated return air escapeway from the 102 longwall active working section is still not being maintained to insure passage at all times of any person, including disabled persons. Citation No. 2212848 was issued on 06-20-84 because of this condition....

Exh. P-4. On July 30, 1984, Mid-Continent abated the condition leading to issuance of the withdrawal order by grading the entire escapeway to a height of at least 6 feet and a width of 8 feet.

At the hearing, Mid-Continent conceded that the conditions cited by Villegos violated section 75.1704. Mid-Continent argued, however, that because the obstruction cited by Smith in the withdrawal order was different from the obstruction cited in the citation, the section 104(b) order was improperly issued on the basis of its failure to abate the violation alleged in the citation. The Secretary argued that because the escapeway was obstructed on July 25, Mid-Continent had not abated the violation within the period of time as subsequently extended. Alternatively, the Secretary argued that the conditions observed by Smith constituted a separate violation of section 75.1704 and that the contested withdrawal order should be modified to a section 104(a) citation. 5/ 9 FMSHRC 1759-60 (Tr. 114, 274-75).

In his decision the judge followed the alternative course argued for by the Secretary. He found that the Secretary had proved two separate violations of section 75.1704 -- one on June 20, 1984, and one on July 25, 1984 -- but concluded that the Secretary had not proved that Mid-Continent failed to abate the first cited violation. Therefore, the judge held that the order of withdrawal was invalid, and he modified it to a section 104(a) citation. 9 FMSHRC at 1766-67.

In considering the validity of the withdrawal order the judge stated:

4/ The judge found that "[t]he area described in the withdrawal order was closer to the face than the area described by Inspector Villegos in the citation...." 9 FMSHRC at 1763. On review it is undisputed that the sites of the violation cited in the citation and the withdrawal order were different.

5/ Although Mid-Continent did not file a notice of contest pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d), challenging the issuance of the section 104(b) withdrawal order, the propriety of its first time challenge to the merits of the withdrawal order in this civil penalty proceeding was not argued to the judge or raised on review and therefore is not at issue.

I ... find insufficient evidence of [the Secretary's] "failure to abate" allegation, not simply because the second (July 25) violation occurred in a different area, but because there (a) is no reliable evidence as to the condition of the original (June 20) violation situs after July 11, coupled with the fact (b) that there is insufficient evidentiary basis to draw the inference that the return escapeway, for one reason or another, at one location or another, was not cleaned up, or maintained adequately during the period July 11 - July 25 to constitute an abatement at some point in time of the original violation.

Accordingly, it is concluded that the 104(b) Withdrawal Order was improperly issued.

9 FMSHRC at 1766-67.

On review, the Secretary argues that the judge erred in finding that the section 104(b) order was invalid because the Secretary had not proved that the violative condition existed continuously from the time the condition was originally cited until the time the order was issued. In the Secretary's view, if, during a follow-up inspection, an inspector finds that the operator is not in compliance with the standard cited in a prior section 104(a) citation, a section 104(b) order may validly issue. Because on July 24 Mid-Continent was not in compliance with section 75.1704, the Secretary contends that the section 104(b) withdrawal order was valid.

We conclude that to the extent the judge's decision can be read as holding that to establish the validity of a section 104(b) withdrawal order the Secretary must prove the violative condition continuously existed from the time when the condition was cited until the order was issued, the judge erred. Requiring the Secretary to prove the violation's continuous existence would compel the Secretary to constantly monitor the operator's abatement activities, an unrealistic burden not contemplated by the Act. Moreover, it is the operator who is in the best position to know and prove precisely what has been done to abate the underlying violation.

Nonetheless, when the validity of a section 104(b) order is challenged by an operator, it is the Secretary, as the proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, that the Secretary establishes a *prima facie* case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the *prima facie* case by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred.

We now turn to the merits of the failure to abate order at issue.

Under section 104(b) of the Act it is the operator's duty to abate the "violation described in [the] citation issued pursuant to [section 104(a)]." When issuing a section 104(a) citation the inspector must "describe with particularity the nature of the violation" as well as "fix a reasonable time for the abatement of the violation." 30 U.S.C. § 814(a). 6/ Section 104(a) thus mandates that the operator be given fair notice in the citation of the violation that it is required to correct. See Eastern Associated Coal Corp., 1 IBMA 233, 235 (December 1972). Furthermore, in fixing a reasonable time for abatement, the inspector necessarily must specify the violative conditions found and determine the time reasonably required for abatement of the specified conditions. Subsequent violative conditions, not described in the original citation, may be subject to separate enforcement actions by the Secretary, but are not properly grandfathered into the abatement duties imposed upon the operator as a result of the original citation.

Therefore, the initial question before us in considering the validity of the section 104(b) withdrawal order at issue is whether the Secretary proved that the violative conditions identified in the underlying section 104(a) citation were present at the time of issuance of the section 104(b) withdrawal order. Accordingly, we must look to the underlying section 104(a) citation issued by Inspector Villegos and relevant testimony to determine the conditions that Mid-Continent was required to correct in order to abate the cited violation of section 75.1704. The specific conditions in the escapeway for which Villegos cited Mid-Continent were conditions "450 feet outby the 102 longwall face" where "floor material had been pushed up to within 4 feet of the roof forming a bank and an impoundment of water and rock up to 15 inches deep and 75 feet in length." Exh. P-1. The fact that these were the violative conditions for which Mid-Continent was cited is underscored by the fact that Villegos initially fixed only 3 hours and 45 minutes for abatement of the conditions.

The Secretary did not prove that the same violative conditions cited by Inspector Villegos were present on July 25, 1984. Inspector Smith could not state that the specific conditions cited in the June 20 section 104(a) citation had not been remedied. Tr. 155; 9 FMSHRC at 1764. While on both June 20 and July 25 a dam and an impoundment of water were found to obstruct the escapeway, it was not proven to the judge that the obstructions were the same. In fact, as the judge noted, Smith's testimony established that the situs of the obstructive conditions on July 25 was different from the situs of the obstructive

6/ Section 104(a) of the Mine Act states in part:

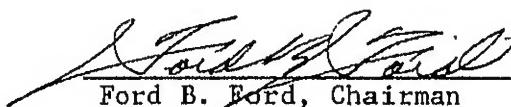
"Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for abatement of the violation."

30 U.S.C. § 814(a).

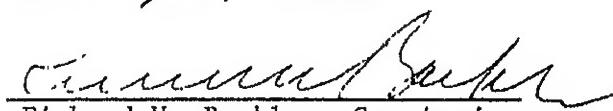
conditions cited by Villegos on June 20. 9 FMSHRC at 1763, 1767. By July 25, Mid-Continent had graded the area of the escapeway where Villegos observed the obstruction. See Exh. R-1.

The floor heave, deterioration of the pack walls, and obstruction in the mine's escapeways is the result of a continuous, natural process at the Dutch Creek No. 1 mine. The record establishes that such problems can occur quickly when, as here, mining has proceeded and the face has advanced. Tr. 34-35, 170, 184-185. Given these natural geologic propensities, the conditions found by Smith on July 25 may have been "similar" to those found by Villegos on June 20. Sec. Br. 8. The mere subsequent existence of similar conditions, however, is an inadequate basis for concluding that the section 104(a) citation issued to Mid-Continent had not been abated. We therefore find that substantial evidence supports the judge's finding that the Secretary has not established that Mid-Continent failed to abate the violation originally cited.

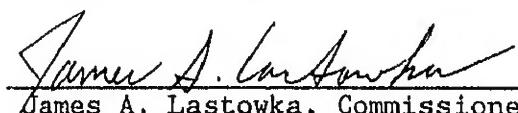
Because the Secretary did not prove that the violative conditions identified by the inspector in the underlying section 104(a) citation were still extant when the subject section 104(b) withdrawal order was issued, we conclude that the Secretary failed to establish a *prima facie* case that the failure to abate withdrawal order was validly issued. Accordingly, we affirm the judge's decision finding, in accordance with the Secretary's alternative argument before the judge, that the conditions described in the section 104(b) order constituted an additional, discrete violation of 30 C.F.R. § 75.1704. 7/



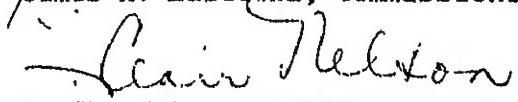
Ford B. Ford, Chairman



Richard V. Backley, Commissioner



James A. Lastowka, Commissioner



L. Clair Nelson, Commissioner

7/ On review, Mid-Continent has moved to traverse what it views as a material mischaracterization of its position by the Secretary. In response, the Secretary states that she never intended her position to have the meaning that Mid-Continent suggests. In view of the Secretary's disclaimer and our conclusion that the Secretary did not prove the validity of the contested order, we find Mid-Continent's motion to be moot.

Commissioner Doyle, concurring in part and dissenting in part:

I concur with the majority's holding that in order to sustain a 104(b) withdrawal order, the Secretary need not prove that the violation continued uninterrupted from the time it was cited until the withdrawal order was issued. The law provides a presumption of continuance with respect to conditions proven to exist at a given time and I see no reason that it should not be applied to the existence of conditions that violate the Mine Act. 31A C.J.S. Evidence §124(1), 29 Am. Jur. 2d Evidence §237. To find otherwise would impose an impossible burden on the Secretary.

I dissent, however, from the majority's affirmance of the judge's finding of insufficient evidence to support the "failure to abate" violation, a finding that was based on the judge's incorrect assumption that it was necessary for the Secretary to prove that the violation continued uninterrupted from the time it was originally cited until the section 104(b) order was issued.

The majority affirms the judge but on the different basis that the Secretary failed to prove that the July 25 obstruction was the same as the June 20 obstruction. Slip op. at 6. In contrast, the judge found that "the essence of the standard is the having of two escapeways as contrasted to a focus on the presence of a particular condition, obstruction or impediment to passage at a given place in the escapeway." 9 FMSHRC at 1767. I agree with the judge and am of the opinion that the record supports his finding.

The regulation in issue, 30 C.F.R. §75.1704, (1984), requires that at least two separate and distinct travelable passageways be maintained to insure passage at all times. The passageway in issue was not so maintained on June 20, 1984, when it was originally cited. It was not so maintained when the inspector returned to the mine on July 5, 1984, and July 11, 1984. Nor was it so maintained when a second inspector visited the mine on July 25, 1984, and issued a section 104(b) withdrawal order.

The evidence indicates that, at the time of the original citation "floor material had been pushed up to within four feet of the roof forming a bank and an inpoundment of water and rock..." at a location "450 feet outby the 102 longwall face." Exh. P-1. The testimony of Mid-Continent's mine superintendent, Allyn Davis, who is also a geological engineer, reveals that Mid-Continent recognized that, in order to abate the violation, it would have to grade the entire tailgate, not just the particular area in question, "[b]ecause that area, you know -- that would just propagate itself. If I cleaned that area up, then, we would find the same thing ahead." Tr. 208. Even if the in-

spector did not immediately recognize the extent of the work that would be required for abatement, he soon became aware that abatement would require grading of the entire tailgate. The inspector who issued the original citation based his extensions of time for abatement upon the extent of grading that had been accomplished. Tr. 93, 94. Similarly the inspector who issued the order did so because the grading was not being done in a diligent manner. Tr. 123.

As Mid-Continent attempted to abate the violation by grading the escapeway, "this mess kept following [them] in or kept preceding [them] in." Tr. 191. The fact that "this mess" had been advanced by the grading and was now at a different location does not, to me, indicate a separate violation but rather that the same violation, a failure to maintain the escapeway to insure passage, was still in existence.

Accordingly, I would reverse the judge and reinstate the section 104(b) withdrawal order.

Joyce A. Doyle
Joyce A. Doyle, Commissioner

Distribution

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, VA 22203

Edward Mulhall, Esq.
Delaney & Balcomb
P.O. Drawer 790
Glenwood Springs, CO 81602

Administrative Law Judge Michael Lasher
Federal Mine Safety & Health Review Commission
280 Colonnade Center
1244 Speer Blvd.
Denver, Colorado 80204

ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

APR 4 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 88-254-M
Petitioner : A.C. No. 05-03211-05501
: :
v. : Breezy Mine
: :
URRALBURU MINING COMPANY, :
Respondent : :

DECISION

Appearances: Robert J. Murphy, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner.

Before: Judge Lasher

This matter arises upon the filing of a proposal for penalty by the Secretary of Labor on August 11, 1988, seeking assessment of civil penalties against Respondent for the violations alleged in two Citations numbered 2640413 and 2640414; such Citations issued pursuant to the provisions of Section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (1977), and charged infractions of 30 C.F.R. § 57.1000, and 30 C.F.R. § 41.20, respectively.

As above indicated, Petitioner was represented at this hearing by counsel but Respondent, which the record shows received actual and legal notice of the hearing held on February 13, 1989, neither appeared nor advised the Presiding Judge or counsel for Petitioner of its intent not to appear. In such circumstances the testimony of the issuing inspector, Dennis J. Tobin, was submitted on the record under oath in support of the Petitioner's position together with certain documentary evidence. Based thereon, at the close of the hearing, this bench decision was issued.

Findings with respect to Citation No. 2640413:

This Citation was issued by Inspector Tobin on March 16, 1988, when he discovered, while enroute to inspect another mine, tire tracks leading to the subject mine, i.e., Respondent's Breezy Mine. Inspector Tobin parked his vehicle at the mine entrance and waited until the mine operator, Ben Urralburu, came

out of the mine portal in the company of two other miners, one of whom was recognized by the Inspector as a longtime employee of Mr. Urralburu.

At this time Mr. Urralburu advised the inspector that he had just started mining, and the Inspector advised Mr. Urralburu of the requirement of 30 C.F.R. § 51.1000 for a mine operator to notify MSHA before commencement of mining operations.

30 C.F.R. § 57.1000 states, "The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations of the approximate or actual date mine operations will commence."

Other provisions of this regulation require that the notification include the name of the mine, its location, the name of the person in charge and other pertinent data.

Mr. Urralburu indicated, as his justification for failure to provide such notification, that Union Carbide had filed such papers for him in the past. The Inspector apparently did not recognize this as legal justification sufficient to excuse the violation, nor do I. The violation consists, without more, of the failure to notify MSHA of the contemplated commencement of mining operations. The importance of such notification to implementation of the safety program created by Congress is obvious. It is therefore concluded that a violation of 30 C.F.R. § 57.1000 occurred as charged and an appropriate penalty therefor will be subsequently assessed herein.

Findings with respect to Citation No. 2640414:

This Citation, actually issued on March 17, 1988, but back dated to March 16, 1988, by Inspector Tobin, charges the Respondent with failing to file a legal identity report in accordance with 30 C.F.R. § 41.20. Without belaboring the point, the record clearly establishes that Respondent did in fact fail to file such report, and such failure in and of itself constitutes the violation.

Accordingly, the Inspector's judgment in connection with the issuance of this Citation is affirmed, and the violation charged is found to have occurred.

Assessment of Penalties

At the hearing Petitioner presented documentary evidence (Exhibit P-1) indicating that during the two-year period preceding the issuance of the subject Citations Respondent had a history of two prior violations.

Petitioner does not contend that either of the violative conditions reflected in the two Citations was not promptly abated in good faith by Respondent upon notification of such.

The record reflects, and Respondent has not established of course at the hearing, or for that matter in pretrial submissions prior to the hearing, that assessment of penalties at the level sought by Petitioner would jeopardize its ability to continue in business.

Based on information provided by the inspector on the face of both Citations with respect to the likelihood of occurrence of injuries and the contemplated severity of any such, neither violation is found to be serious.

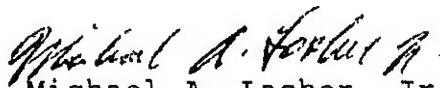
This operator, who is found to be a small mine operator, had approximately 20 years of prior mining experience. Based thereon, and the content of conversations with the issuing Inspector at the time of the issuance of the Citations, it is both found and inferred that the Respondent had knowledge of the requirements of the two regulations infacted and accordingly Respondent is found to be negligent in the commission of both violations.

Petitioner seeks assessment of \$20 for each of the two violations. Such is found appropriate and is here assessed.

ORDER

Citations numbered 2640413 and 2640414 are both affirmed.

Respondent, if it has not previously done so, is ordered to pay the total sum of \$40 to the Secretary of Labor within 30 days as and for the civil penalties here assessed.


Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Robert J. Murphy, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Mr. Ben Urralburu, Urralburu Mining, P.O. Box 310, Nucla, CO 81424 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 5 1989

GEORGE H. ADKINS, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 88-180-D
: BARB CD 88-23
BOB & TOM COAL, INC. :
Respondent : No. 5 Mine

ORDER OF DISMISSAL

Before: Judge Maurer

The parties, by counsel, have jointly moved to dismiss the captioned case on the grounds that they have reached a mutually agreeable settlement. Under the circumstances herein, permission to withdraw the complaint is granted. 29 C.F.R. § 2700.11. The case is therefore dismissed, with prejudice, as requested by the parties; and the hearing set for April 13, 1989, in London, Kentucky is cancelled.


Roy J. Maurer
Administrative Law Judge

Distribution:

Margaret R. Barr, Esq., Tony Oppegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., P.O. Box 919, Barbourville, KY 40906 (Certified Mail)

Otis Doan, Jr., Esq., P.S.C., 119-A First St., Harlan, KY 40831 (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 6 1989

RUSHTON MINING COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 89-82-R
	:	Citation No. 2889823; 1/17/89
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Rushton Mine
	:	

DECISION

Before: Judge Broderick

STATEMENT OF THE CASE

Contestant Rushton Mining Company (Rushton) filed a Notice of Contest on February 8, 1989, contesting the validity of Citation 28809823 issued on January 17, 1989. The citation charged a violation of 30 C.F.R. § 70.501 because an MSHA-conducted noise survey showed that the noise standard was exceeded in the environment of a roof bolter operator. The citation fixed March 20, 1989 for termination of the violation. The Secretary of Labor (Secretary) filed an answer and a motion for continuance on February 27, 1989. On March 3, 1989, Rushton filed a Motion for Summary Decision and a Motion for expedited consideration. Following a conference with counsel, the Secretary agreed to extend the time for abatement to April 3, 1989. On March 24, 1989, the Secretary filed a cross-motion for Summary Decision. I was orally informed by counsel for Rushton that the hearing conservation plan referred to in the citation has been submitted by Rushton to MSHA. The Secretary's cross-motion states that the citation did not require the submission of a hearing conservation plan in order to abate the citation. It further states that abatement was achieved by Rushton by lowering the noise levels in the affected area. On March 31, 1989, Rushton filed a response to the Secretary's cross-motion. The notice of contest challenged the designation of the violation as significant and substantial. However, neither motion has referred to this as an issue, and I have no factual basis to make a finding whether, if a violation is established, it was significant and substantial. Therefore, I will not make a ruling on this question.

FINDINGS OF FACT

The parties agree that there is no dispute as to any material fact in this proceeding. On January 10, 1989, Federal Coal Mine Inspector Donald Klemick conducted a noise survey in the 4th East 002 section of the subject mine. As a result of the survey, he determined that the noise standard had been exceeded in the environment of the roof bolter operator. Rushton does not contest the inspector's determination. Therefore, I find as a fact that the noise levels in the cited area exceeded the levels permitted by the regulation. The inspector issued a citation charging a violation of 30 C.F.R. § 70.501. He directed that the violation be abated by March 20, 1989. The citation also states that "a hearing conservation plan, as required by section 70.510, shall be submitted to MSHA within 60 days from the date of this citation." As I mentioned above, the Secretary states in her motion that this language does not require submission of such a plan in order to abate the citation, but was only "a reminder" that the issuance of a citation under § 70.501 "triggers" § 70.510 which requires that such a plan be submitted within 60 days of the issuance of a citation. Therefore, I assume for the purposes of this decision that the citation has been abated. Rushton argues that the requirement to file a hearing conservation plan is triggered not by a violation of § 70.501, but by excessive noise levels disclosed in a supplemental noise survey under § 70.509. This issue is not presented in this case: MSHA concedes that the citation contested herein has been abated; the submission of a hearing conservation plan was not required to abate the citation. I am not ruling on the question whether 30 C.F.R. § 70.510 requires the submission of an effective hearing conservation plan following the issuance of a citation under § 70.501 because of excessive noise levels found on an MSHA conducted noise survey.

REGULATIONS

30 C.F.R. § 70.501 provides:

Every operator of an underground coal mine shall maintain the noise levels during each shift to which each miner in the active workings of the mine is exposed at or below the permissible noise levels set forth in Table I of this subpart.

Section 70.502 sets forth a formula for computation of multiple noise exposure. Section 70.503 requires mine operators to measure noise exposures of each miner in the active workings of the mine. Section 70.504 directs that the measurement of noise exposure be made by qualified persons certified by MSHA as qualified. Sections 70.505 and 75.506 describe the necessary

equipment and procedures for measuring noise exposure. Section 70.507 requires an initial noise survey be performed before June 30, 1971, and section 70.508 requires periodic noise surveys with the results reported to MSHA. Section 70.509 provides that if a noise exposure survey under § 70.507 or § 70.508 shows excessive noise levels, a supplemental survey shall be conducted by the operator within 15 days after notification by MSHA, and the results reported to MSHA. Section 70.510 provides that if the supplemental survey shows excessive noise, a citation shall be issued, and the operator shall promptly institute measures to assure compliance. The operator is also required by this subsection to submit within 60 days of the date of the issuance of the citation, a hearing conservation plan.

ISSUE

Whether a citation may be issued under section 104(a) of the Act for a violation of 30 C.F.R. § 70.501 based on the results of a noise survey conducted by an MSHA inspector showing an excessive noise level?

CONCLUSIONS OF LAW

Rushton concedes that 30 C.F.R. § 70.501 "seems to indicate that a noise survey indicating an excessive noise level is a violation of the regulations." It argues, however, that Subpart F of Part 70, 30 C.F.R. when read as a whole, indicates that noise surveys are to be conducted by mine operators. When an operator's survey shows excessive noise levels, it is required under § 70.509 to conduct a supplemental noise survey. Only if the supplemental survey shows excessive noise, Rushton asserts, is a citation to be issued.

Section 103 of the Act requires authorized representatives of the Secretary to make frequent inspections of coal mines for the purpose, *inter alia*, of determining whether there is compliance with the mandatory health or safety standards. Section 104 directs the Secretary or her authorized representatives to issue a citation to the mine operator if she believes the operator has violated any mandatory health or safety standard. Section 206 of the act directs the Secretary to publish proposed mandatory health standards establishing maximum noise exposure levels for all underground coal mines. It also directs mine operators to conduct tests of the noise levels at their mines. This provision was originally enacted as part of the Federal Coal Mine Health and Safety Act of 1969. 30 C.F.R. § 70.500-70.511 (Subpart F) contains the noise standard regulations. They were promulgated July 7, 1971, and amended September 12, 1978, September 11, 1979, and June 29, 1982. The regulations do not specifically provide that the Secretary's

representative may issue a citation for excessive noise disclosed in an MSHA noise survey; neither do they forbid the issuance of such a citation. In view of the responsibility placed on the Secretary's representatives by § 103 and § 104 of the Act, to imply such a limitation on the Secretary's authority because the operator is also required to take noise samples, would be an extreme and unreasonable interpretation of the regulations. Furthermore, the Secretary has, in her Program Policy Manual issued July 1, 1988, specifically referred to MSHA-conducted noise surveys and the issuance of citations under 30 C.F.R. § 70.501 for excessive noise exposures found in such surveys. This constitutes an official interpretation of the regulation which must be given deference.

Therefore, I conclude that the Secretary is authorized to issue a citation for the violation of 30 C.F.R. § 70.501 based on the results of an MSHA-conducted noise survey showing an excessive noise level.

ORDER

Based on the above findings of fact and conclusions of law,
IT IS ORDERED:

1. Citation No. 2889823 as modified is AFFIRMED.
2. The Notice of Contest is DENIED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Joseph Yuhas, Esq., Rushton Mining Company, P.O. Box 367,
Ebensburg, PA 15931 (Certified Mail)

Therese I. Salus, Esq., U.S. Department of Labor, Office of the
Solicitor, 3535 Market St., Philadelphia, PA 19104 (Certified
Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 6 1989

ROGER L. STILLION, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 88-91-D
: MORG CD 88-3
QUARTO MINING COMPANY, :
Respondent : Powhatan No. 4 Mine

DECISION

Appearances: Thomas M. Myers, Esq., United Mine Workers of America, Shadyside, OH, for Complainant; Michael Peelish, Esq., Consolidation Coal Company, Pittsburgh, PA for the Respondent

Before: Judge Fauver

Complainant brought this proceeding under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., to recover compensation for his time spent as a "walkaround representative" of miners during a federal mine inspection.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the discussion that follows.

FINDINGS OF FACT

1. Around August 1987, the Quarto Mining Company entered into a contract with A&C Construction Company, for the hauling of top soil and the removal of trees and brush at its Powhatan No. 4 Mine.

2. A&C Construction Company had about 12 to 15 employees performing contract work, and Quarto Mining Company had about 12 of its employees working in and about the same area as the A&C employees. Quarto employees were hauling rocks and stones from stone bins to the top of the hill where A&C Construction employees were working.

3. Shortly after A&C commenced its project on the Quarto Mining property, rank-and-file Quarto employees began

complaining to Ron Winkler, the outside safety committeeman, and to other union officials, with respect to the manner in which A&C employees were driving their trucks, and also with regard to a dust problem on the haul road and the lack of backup alarms on A&C equipment. Several Quarto employees raised similar complaints about A&C Construction employees and their equipment at the September, 1987, union meeting of Local Union 1785. Complainant, a union member, had also observed several of the complained-of conditions himself.

4. After the local union meeting at which the various complaints had been raised, safety committeeman Ted Hunt placed a Code-a-Phone call to MSHA, requesting that an inspection be conducted concerning A&C's equipment.

5. The haul road from the top of the hill, where the gob pile was located, to the bottom near Route 7 was a winding road and had areas cut out for the purpose of yielding the right-of-way. One of the complaints of Quarto employees was that A&C employees were not yielding the right-of-way. Quarto employees, as a part of their training, knew that the wide areas were designed to allow empty trucks going downhill to yield the way to loaded trucks which were going up the hill.

6. In response to the Code-a-Phone complaint by the union, MSHA Inspector Homko came to the Quarto property on October 2, 1987, and began an inspection of the A&C equipment. During that inspection, a walkaround representative for Local Union 1785, a Quarto employee, was paid for his participation as a walkaround, and was joined by Quarto safety representative Percy Hawkins.

7. During the inspection, one Quarto employee told the inspector that the A&C Construction employees were not yielding the right-of-way.

8. The inspection continued into the following week. In that week, Complainant Stillion was asked by mine safety committeeman Ted Hunt to accompany the federal inspector as a union walkaround on the remainder of the inspection of A&C's equipment. On October 6, Complainant met Inspector Gary Gaines to tell him that he was going to accompany Gaines as the walkaround for the remainder of the inspection, and Respondent's representative told Complainant that he would not be paid for his time spent with Inspector Gaines.

9. Quarto's refusal to pay Complainant reflected a change of policy. For about 16 years before this inspection, union representatives had accompanied federal inspectors on

both regular general mine inspections and specific inspections which were aimed at the inspection of contractors' equipment only, and were compensated by Quarto in both cases.

10. On October 6, 7 and 8, 1987, Complainant Stillion traveled with Inspector Gaines but was not paid for any of his time spent on the inspection. As a result of the inspections conducted by Inspectors Homko and Gaines, several citations were issued to the A&C Construction Company.

11. The reason for the Code-a-Phone call to MSHA was the concern of safety committeeman Hunt for the safety of Quarto employees, based upon by the various complaints which Quarto employees had made concerning the safety of A&C equipment and the manner in which the equipment was being operated by A&C employees.

DISCUSSION WITH FURTHER FINDINGS

The basic issue is whether Complainant, a walkaround representative of Quarto's miners, was entitled to be paid under § 103(f) of the Act for the time he participated in a federal inspection of A&C's equipment at Quarto's mine. The inspection was at the request of the Quarto employees through their miners' representative. The request was transmitted by Code-a-Phone to MSHA and, for the purpose of this Decision, is treated as an inspection request made under § 103(g)(1) of the Act.

Section 103(g)(1) provides in part:

Whenever a representative of miners . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such . . . representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. * * *

Section 103(f) provides in part:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by the miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of

subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. * * * Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. * * *

In United Mine Workers of America v. FMSHRC, 671 F. 2d 615 (D.C. Cir. 1982), cert. denied, 459 U.S. 927, the D.C. Circuit Court of Appeals examined § 103(f) in depth to determine whether Congress intended to grant walkaround rights to miner representatives for spot or specific hazard inspections, in addition to "regular" inspections required by § 103(a) of the Act. The court held that "spot" inspections are authorized by and made pursuant to § 103(a) of the Act and are therefore covered by the walkaround compensation rights granted by § 103(f). In reaching this holding, the court gave weight to the Secretary's Interpretative Bulletin of April 19, 1978 (43 Fed. Reg. 1754-47 (1978)), observing that the Secretary's interpretation is entitled to deference and that the Act, as safety legislation, is to be liberally construed to effectuate the Congressional purpose. The court stated further:

We agree with the Secretary that under Section 103(f) miner representatives are entitled to walkaround pay rights with respect to any physical inspection of a mine carried out under Department of Labor auspices for the purpose of determining "whether an imminent danger exists," or "whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter."

The Secretary's interpretative bulletin also interprets § 103(f) as applying to inspections made at the request of a representative of the miners. Indeed, no significant distinction could be made in applying § 103(f) to spot inspections as well as § 103(g)(1) inspections because the authority for both kinds of inspections ultimately derives from § 103(a) of the Act. Section 103(g) inspections are therefore subject to the walkaround pay requirements of § 103(f).

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.

2. Respondent violated § 103(f) of the Act by refusing to pay Complainant his regular rate of pay for his time spent accompanying a federal mine inspector on October 6, 7, and 8, 1987.

ORDER

1. The parties are directed to confer within 15 days of this Decision in an effort to stipulate the amount of Complainant's back pay (with accrued interest computed according to the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1443 (1988), pet. for review filed, No. 88-1873 (D.C. Cir. Dec. 16, 1988)) and Complainant's litigation expenses, including a reasonable attorney's fee.

2. Within 30 days of this Decision, Complainant shall file either a stipulated proposed order awarding monetary relief signed by both parties 1/ or, if there is no stipulation, Complainant's proposed order awarding monetary relief. If there is no stipulation, Respondent shall have 10 days after the proposed order is filed to file a response. If appropriate, an additional hearing will be scheduled to resolve any issues of fact as to monetary relief.

3. The above Decision will not become final until an order is entered awarding monetary relief and declaring the above Decision to be final. The judge will retain jurisdiction of this proceeding until such an order is entered.

William Fauver
William Fauver
Administrative Law Judge

1/ Respondent's stipulation of a proposed order awarding monetary relief will not limit its right to seek review of a final Decision and Order entered in this proceeding.

Distribution:

Thomas M. Myers, Esq., General Counsel, UMWA, District 6,
56000 Dilles Bottom, Shady Side, OH 43947 (Certified Mail)

Michael R. Peelish, Esq., Quarto Mining Company, 1800
Washington Road, Pittsburgh, PA 15241 (Certified Mail)

iz

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 6 1989

RODNEY CHANEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
V.	:	Docket No. KENT 88-82-D
	:	PIKE-CD-88-03
JOHNNY TACKETT,	:	
(GILLETTE COAL COMPANY)	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Maurer

Respondent, by counsel, has moved to dismiss the subject complaint because of the complainant's continued failure and refusal to abide by the Commission's Rules of Practice or otherwise cooperate with the respondent to facilitate the trial of this case.

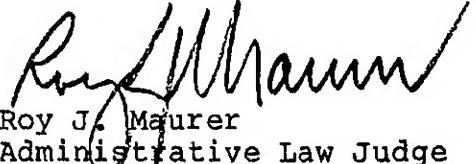
More specifically, on August 30, 1988, a Notice to take the deposition of the complainant and a request for production of documents was served upon the complainant. The complainant did not appear for the deposition or produce the documents, even though the deposition was once postponed at the request of the complainant and rescheduled at his convenience. Again, on February 14, 1989, a notice to take the deposition of the complainant and a request for production of documents was served upon the Complainant. Once again, the complainant failed to appear for his deposition or produce the requested documents.

Additionally, I note that I have scheduled this case and noticed it for hearing on three occasions. Once before, I have continued it at the request of the complainant and this last time because the complainant has failed and refused to cooperate with the normal discovery processes available to the parties to prepare their cases. I further note that complainant has never complied with the prehearing order issued by the undersigned on any of the three occasions that the case has been set down for hearing.

On March 7, 1989, an ORDER TO SHOW CAUSE was issued by the undersigned, wherein the complainant was ordered to show cause within ten (10) days as to why this proceeding should not be dismissed for "failure to prosecute his complaint or otherwise

cooperate with the respondent to facilitate the trial of this case. There has been no response received to date with regard to this order or the respondent's motion to dismiss.

Accordingly, respondent's motion to dismiss IS GRANTED and this case IS DISMISSED.



Roy J. Maurer
Administrative Law Judge

Distribution:

Robert J. Breimann, Esq., Street, Street, Scott, & Bowman, P.O. Box 2100, Grundy, VA 24614 (Certified Mail)

Mr. Rodney Chaney, Rt. 1, Box 105A, Kingston, TN 37763
(Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 6 1989

LOCAL UNION 1570, DISTRICT 31,: COMPENSATION PROCEEDING
UNITED MINE WORKERS :
OF AMERICA (UMWA), : Docket No. WEVA 88-227-C
Complainants :
v. : Federal No. 2 Mine
: :
EASTERN ASSOCIATED COAL :
CORPORATION, :
Respondent :

DECISION

Appearances: Joyce A. Hanula, Legal Assistant, United Mine Workers of America, Washington, D.C., for the Complainants;
Eugene P. Schmittgens, Jr., Esq., Eastern Associated Coal Corporation, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a claim for compensation filed by the UMWA against the respondent pursuant to the third sentence of section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 821, seeking compensation for miners employed at the captioned mine who were idled for 3-1/2 shifts, from 8:00 p.m., on February 9, 1988, to midnight on February 10, 1988. The UMWA contends that the mine was idled as a direct result of two section 104(d)(2) orders issued at the mine by an MSHA inspector, and the respondent maintains that the mine was idled because of a legitimate business decision by mine management. A hearing was held in Morgantown, West Virginia, and the parties filed posthearing arguments in support of their respective positions. I have considered these arguments in the course of my adjudication of this matter.

Issues

The issues presented are (1) whether or not the orders in question were final orders within the meaning of the Act; (2) whether the mine or miners were idled by those orders; and (3) whether the miners are entitled to compensation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following:

1. The members of Local Union 1570 are employed at Eastern's Federal No. 2 Mine.
2. The UMWA is the authorized representative of the members of the Local Union 1570.
3. The Federal No. 2 Mine is a mine whose operations and products affect interstate commerce.
4. On February 8, 1988, at 6:25 p.m., MSHA Inspector Michael G. Kalich issued Order No. 2943582 pursuant to Section 104(d)(2). Order No. 2943582 applied to the Federal No. 2 Mine. A copy of said order was attached and marked as Exhibit A to the joint stipulations of fact.
5. On February 10, 1988, at 12:00 noon, Order No. 2943582 was vacated. A copy of the document vacating said order was attached and marked as Exhibit B to the joint stipulation of fact.
6. On February 8, 1988, at 6:30 p.m., MSHA Inspector Michael G. Kalich issued Order No. 2943583 pursuant to Section 104(d)(2). Order No. 2943583 applied to the Federal No. 2 Mine. A copy of said order was attached and marked as Exhibit C to the joint stipulation of fact.

7. On February 10, 1988, at 12:00 p.m., Order No. 2943583 was modified. A copy of said modification was attached to the joint stipulation of fact and marked as Exhibit D.

8. Order No. 2943583 was terminated at 3:05 p.m., on February 10, 1988. A copy of said termination was attached to the joint stipulation of fact and marked as Exhibit E.

9. The above referenced orders restricted Eastern from operating the 14 Right 3 South Longwall section.

10. After the issuance of the above referenced orders, the Federal No. 2 Mine continued to operate 2-1/2 shifts.

11. The Federal No. 2 Mine was idle from 8:00 p.m., on February 9, to midnight February 10, 1988.

12. Miners returned to work on the 12:00 a.m. shift on February 11, 1988.

13. The names of the miners idled, their idle time, rate of pay, and alleged lost wages was attached to the joint stipulation of fact and marked as Exhibit F.

14. The aforementioned Order Nos. 2943582 and 2943583 were not contested under Section 105(d) of the Federal Mine Safety and Health Act of 1977.

15. It is the position of the UMWA that the Federal No. 2 Mine was idled as a direct result of the above referenced orders.

16. It is the position of Eastern that the mine was idled as the sole result of a business decision made by management at the Federal No. 2 Mine.

Complainant's Testimony and Evidence

MSHA Inspector Michael G. Kalich testified that he visited the mine on February 8, 1988, after being instructed to do so

by his field supervisor who had received a call that the respondent was operating its longwall section. Mr. Kalich stated that at the time of his inspection of the longwall section a previously filed petition for modification seeking relief from the requirements of mandatory safety standard 75.1002, was still pending for decision by MSHA. He confirmed that he issued section 104(d)(2) Order No. 2943582, on February 8, 1988, at 6:25 p.m., citing a violation of section 75.1002, and that he did so because of the respondent's failure to comply with one of the conditions of the petition, namely paragraph 7, which required the respondent to provide overtemperature protection for the high-voltage neutral grounding resistor used in the high-voltage circuit supplying the longwall power center (exhibit R-2, Petition for Modification filed December 1, 1987). Mr. Kalich issued the order because he found that the longwall power center was energized, that some amount of coal had been produced, and the overtemperature device required by paragraph 7 of the petition had not been installed (Tr. 6-8).

Mr. Kalich confirmed that he subsequently vacated Order No. 2943582 after being informed by his supervisor that he could not issue a violation based on a pending petition for modification which had not been granted. He also confirmed that he could not have issued the order citing a violation of section 75.1002 independent of the modification petition because the power center was outby the area, and the vacated order in question was based on paragraph 7 of the pending modification petition rather than on section 75.1002. He explained that he cited a violation of section 75.1002 "because that is what the petition is based on, relief of that standard," but he confirmed that the cited condition was not in violation of section 75.1002 (Tr. 9-11).

Mr. Kalich confirmed that he issued the second section 104(d)(2) Order No. 2943583, at 6:30 p.m., on February 8, 1988, on the longwall section citing a second violation of section 75.1002, because he found that the high voltage cables on the section were located inby the last open crosscut and were within 150' of the pillar workings. These conditions were independently in violation of the requirements of section 75.1002, and he based the order on that section rather than on paragraph 7 of the pending modification petition. Since he could not base the order on the petition, he simply included the language referencing the petition from the prior vacated order as part of the subsequent Order No. 2943583, by modifying it on February 10, 1988 (Tr. 8, 11-12; Exhibits C & D, stipulations). Mr. Kalich confirmed that the order was terminated on February 10, 1988, by another inspector who was regularly assigned to the mine (Tr. 12; Exhibit E, stipulations).

On cross-examination, Mr. Kalich stated that he never closed the mine or required that any miners be withdrawn, and that "I just required that the power center be de-energized" (Tr. 13). With regard to the cited overtemperature device mentioned in Order No. 2943582, he confirmed that "it was repaired after I issued the order," and a copy of the order reflects that it was terminated at 7:35 p.m. the same evening that it was issued (Tr. 13; Exhibit A, stipulations). He confirmed that with respect to both orders, he simply required the power to be deenergized, and that by doing this, no coal could be mined but that "they could do any kind of setup work they wanted to do" (Tr. 18). Although he did not remain at the mine after he issued the first order, he "heard that men were laid off" (Tr. 18).

Terry Osborne UMWA District #31, International Safety Representative, testified that he was familiar with the modification petition in question and that prior to its filing and the issuance of the orders by Inspector Kalich, representatives of the UMWA and mine management were meeting to discuss the conditions to be included in the petition for its approval. The last meeting was held on January 29, 1988, and as of that date, the UMWA had not agreed upon the terms for approval of the petition. When he learned from the local union president that the respondent intended to operate the longwall while the petition was still pending, he placed a call to MSHA and requested an investigation into the possibility of the longwall being operated with high voltage at the face without the petition being granted. As a result of this call, MSHA inspectors were sent to the mine on the afternoon shift when the orders were issued. The petition was subsequently granted on February 10, 1988, 2 days after the orders were issued (Tr. 19-22).

On cross-examination, Mr. Osborne confirmed that in the course of the meetings with mine management with respect to the petition, the future of the mine was discussed, and mine management expressed the view that in the event the petition were not granted the mine would "suffer severe consequences" (Tr. 23). Mr. Osborne stated that mine management advised the union that if the petition were not granted the mine would be shut down and that "This mines will not operate unless the petition is granted and this longwall is running" (Tr. 24).

Mr. Osborne agreed that longwalls produce more coal more efficiently than continuous miners, and that unless coal is mined economically the mine will not make money. He also

agreed that the mine operator may decide which method of mining to use in its mine, and that layoffs occur in the mining industry for mines which do not make money (Tr. 25). He stated that the mine had in the past operated for years with a longwall without the necessity for filing a petition and without high voltage at the face of the longwall, and that "they did excellent" (Tr. 28).

Larry Knisell, president of the local union and member of the mine safety and health committee, testified that he was familiar with the modification petition in question and the orders issued by Inspector Kalich. He confirmed that he took part in the meetings with mine management with regard to the petition and that the local union did everything it could to "help it along," and he realized that management needed the high voltage at the longwall (Tr. 30).

Mr. Knisell stated that he learned that the longwall had been running on February 8, 1988, the day the order was issued. He confirmed that when the order was issued, the miners worked the rest of that day, and that on February 9, the four to twelve shift was idle for 4 hours, and that on February 10, "there was some work done in the mines." The 15 longwall development section was being "driven up one side to set the longwall on," and that coal was being produced on the 15 Right 3 South Section. He did not know whether any other sections were producing coal at this time (Tr. 32). He confirmed that it was common knowledge at the mine that if the petition were not ultimately approved there would be "serious economic consequences," and that he became aware of this sometime in January, 1988 (Tr. 32).

Respondent's Testimony and Evidence

General Mine Superintendent Mick Toth testified that the February 8, 1988, order issued by Inspector Kalich was of "no importance" because the reason for not operating the longwall was the fact that the petition for modification had not been granted. Mr. Toth confirmed that he was never told that the inspector had closed the mine or required the withdrawal of any miners at the longwall or any other section of the mine. He explained that meetings and discussions were held with

resulting from the unavailability of the longwall (Tr. 45-46; Exhibit R-1). He also identified a copy of a letter dated January 13, 1988, from the respondent's attorney to MSHA requesting expedited consideration of the modification petition, and advising MSHA of the adverse economic impact on the mine if the petition were not granted (Tr. 47; Exhibit R-2).

Mr. Toth stated that the mine is a profitable mine, and he confirmed that it produces coal on a longwall section and four belt and continuous miner sections. He explained the coal production figures, and confirmed that by February 3, 1988, all of the available coal on the longwall panel had been mined, and that no coal production took place on that longwall from February 3 to February 8, 1988 (Tr. 49-52). He produced copies of the mine production records for January and February, 1988, and confirmed that for the period January 29 to February 3, 1988, coal production on the longwall was reduced by 110,000 tons (Tr. 55; Exhibits R-3 and R-4).

Mr. Toth stated that during the period from February 3 to the afternoon shift on February 9, no miners were idled, and he confirmed that if the petition for modification had been granted prior to February 9, the mine would not have been closed (Tr. 56). He explained that the power was on the longwall section on February 8, in order to make the necessary startup "trim pass" adjustments in anticipation of the granting of the modification petition. Mr. Toth stated further that power was on the section a week earlier, and none of the union representatives or MSHA inspectors who were at the face objected. He confirmed that he had no intention of mining coal on the longwall until the petition was granted, and that the section 104(d)(2) orders had nothing to do with his decision to idle the mine on February 9 (Tr. 57-58).

On cross-examination, Mr. Toth confirmed that the modification petition was filed on December 1, 1987, and that the approval process is time consuming. In instances of previously filed petitions, "interim relief" was available to a mine operator pending final approval by MSHA, but this procedure is no longer available. Although he believed that the union did everything it could to support the petition, delays and disagreements with respect to the conditions upon which the petition could be approved were encountered (Tr. 60).

Mr. Toth confirmed that the longwall section in question was energized on February 4 or 5, and the cables were energized so that equipment could be moved. He stated that he made several calls to MSHA personnel and they informed him that if the petition had not been granted they could not advise him to

put the longwall into production, and apart from any "trim pass," no coal production was started on the longwall until final approval of the petition was received (Tr. 63-64). Mr. Toth also explained that the power was on so that the MSHA inspectors could check all electrical connections and startups to confirm that the conditions under which the petition were to be granted were being followed, and that this was taking place on or about February 4 (Tr. 67).

Mr. Toth explained that during the day shift on February 8, a "trim pass" was made on the longwall section, and this process included necessary adjustments to the shearing machine cable and chain. He stated that this process did not involve the normal production cutting and mining of the coal, and that the "trim" only cut away 2 inches of coal, rather than the usual 30 inch cut taken during normal production. The longwall shields were not advanced, there were no roof falls behind the shields, and there was no gob. The section was "active," the power was on, miners were working, and he believed that the belt was running to take out the trimmed coal (Tr. 73-74). Mr. Toth confirmed that all of the miners who were subsequently idled were working and involved in this process on February 8, and that the petition had not been approved as of that date. He stated that everyone at the mine was aware of the fact that the petition had not as yet been approved at that time (Tr. 79-80). Mr. Toth could not recall speaking with union president Knisell after the orders were issued (Tr. 81).

In response to a question as to why the miners were idled on February 9, Mr. Toth responded as follows (Tr. 81-82):

The reason for the idlement on February 9th, you have to realize that throughout this whole period it was always getting right on the edge, yeah, we'll have it, or already been sent by FAX, the MSHA office, as soon as you get there in the morning, it'll be there at your mine.

That had gone on for several days. I went along with that. I didn't want to idle any miners. I want to make every dime I can make - every ton of coal I can mine. But the that on February 9th I just got - fed up hearing all I was going to - being there in the next hour or two. -- there were some pretty big losses - this period.

I felt from the period January 28th until the time they granted the petition which was the 10th of February, I just couldn't take no more losses. Economic factors, that was my sole reason for doing what I did, and it was something I didn't want to do, but had to do.

Mr. Toth stated that the four continuous miner sections which were in operation on February 8, accounted for approximately 25 percent of the mine production, and that he had full crews working that day. Only one of these developing sections was working on February 10, and the only miners working on this day were those who he believed were necessary to start up the longwall in order to bring the other miners back to work. The longwall started into production on February 11 (Tr. 86-87).

Frank Peduti, Respondent's chief maintenance supervisor, testified that he is responsible for all mine electrical activities. He confirmed that he was at the 14 Right Longwall section on February 8, 1988, making certain adjustments in preparation "to set up the new longwall section" (Tr. 111). He discussed the modification petition with Inspector Kalich, and whether or not an additional overtemperature device had been installed in the load center. Mr. Peduti stated that "I had the part in hand" and that it took 15 minutes to install it (Tr. 112).

On cross-examination, Mr. Peduti stated that at the time he spoke with the inspector and installed the overtemperature device, as well as before going underground that day, he did not "assume one way or the other" that the modification petition had not as yet been granted (Tr. 113).

Mick Toth was recalled and explained that the drop in coal production after the modification petition was granted as shown by his production records, was due to the fact that after mining for 100 feet with the longwall startup, rock displacement was encountered, and throughout the end of February and the first 2 weeks of March "we encountered some difficult problems on that particular longwall panel" (Tr. 120). He reiterated that the order issued by Inspector K had nothing to do with his decision to idle the mine, and explained that he was aggravated and frustrated over the promises and assurances that the modification petition approval was imminent, and when it did not materialize couldn't wait no longer. I got myself where I had no production. I was in some big losses and I had no ot'

choice but to do what I did. That order had nothing to do with that" (Tr. 121, 124). Mr. Toth further explained as follows at (Tr. 121-125):

Q. Could you have used these men on anything else?

A. Not and make money.

Q. Could you have used them on anything else? What do you mean "not make money?" Couldn't you have used them on the other section, the continuous mining section?

A. No-- Yeah, I could have used them. I could have. I've got 580 people at that coal mine and what justified that employment of 580 people is the amount of tons and amount of profit to be made. If those profits and tons aren't made, there's a reasoning for that. The reasoning for that period of time was the lack of the granted Petition for Modification that had been filed for.

* * * * *

A. There were other people that worked in the mine. Like I say, there were other people that worked throughout that period that the mine was idled on a development section. We had a crucial situation at that coal mine on our developments keeping up with retrieve. And the development that I had great concerns about was one immediately outby the longwall.

* * * * *

Q. I'm not going to put myself in the position to cross-examine you, but this next question. What better way of getting someone's attention to shut the whole mine down? I mean, if I were the superintendent and being frustrated, I'd say, well, the heck with it, I'm just going to shut her down and let's see if we can't get some action on that petition. Is that what happened?

A. That's basically what happened. We had no petition and we just -- what we didn't need,

you know -- I can't employ 500 people if I don't have any work for them. I worked what I could and I worked areas I thought were crucial to the future of that coal mine. What I didn't work I didn't need or I'd have worked them.

Complainant's Arguments

In its posthearing brief, the UMWA asserts that since the respondent did not contest the section 104(d)(2) Order No. 2943583, issued by Inspector Kalich at 6:30 p.m., on February 8, 1988, it waived its right to challenge the order pursuant to section 105(d) of the Act, and that in the circumstances, the order has become final. Since the third sentence of section 111 of the Act provides that compensation is due after an order upon which it is based is "final," the UMWA states that the next critical issue to be resolved is whether a nexus existed between the order and the miners being idled. Local Union 781, District 17, UMWA v. Eastern Associated Coal Corp., 3 FMSHRC 1175 (May 1981); Local Union 1889, District 17, UMWA v. Westmoreland Coal Co., 8 FMSHRC 1317 (September 1986) and Local Union 2333, District 29, UMWA v. Ranger Fuel Corp., 10 FMSHRC 612 (May 1988).

The UMWA asserts that the order in question restricted the longwall section from operating until the pending petition for modification was granted, and that this in turn forced the respondent to idle the entire mine because it would not be economically feasible to operate it at a reduced productivity level. Under these circumstances, the UMWA concludes that a "nexus" existed between the issuance of the order and the idlement of the miners. In support of its position, the UMWA maintains that the evidence presented clearly demonstrates that the mine would have continued to work through the period of idlement "but for" the issuance of the order. The UMWA asserts that the evidence shows that the respondent was "fed up" with MSHA's delay in acting on the petition for modification and that Mine Superintendent Mick Toth believed that the economic situation required him to start up the high-voltage longwall, even though he did not have the necessary modification from the requirements of 30 C.F.R. § 75.1002. The UMWA concludes that it is evident that the respondent intended to mine coal without the necessary modification and would have continued to do so had the inspector not issued the withdrawal order.

Citing the Commission's decisions in Local Union 5869, District 18, UMWA v. Youngstown Mines Corp., 1 FMSHRC 990 (August 1979), Local Union 3453, District 17, UMWA v. Kanawha

Coal Co., 1 FMSHRC 1315 (September 1979), and Local Union 1670, District 12, UMWA v. Peabody Coal Co., 1 FMSHRC 1785 (November 1979), the UMWA argues that the fact that the mine continued to work two and one-half shifts after the order was issued does not preclude the miners from receiving compensation because the order was still outstanding when the miners were idled. Citing the Local Union 5869, District 17, UMWA v. Youngstown Mines Corp., case, the UMWA points out that a withdrawal order was issued on the afternoon shift and miners on that shift were withdrawn from production work and detailed to work abating the violation. Every miner who worked on the afternoon shift was paid for the entire shift, but the evening shift employees who were also assigned to abatement work worked only 4 hours and were then sent home. The evening shift employees were paid for the first 4 hours they worked but not for the remaining 4 hours of the shift. In response to a compensation claim filed seeking compensation for the 4 hours of the evening shift that did not work, the Commission granted them compensation for the 4 hours and stated as follows at 1 FMSHRC 992:

[A]t the time the miners were sent home the withdrawal order was still outstanding. But for the withdrawal order, the miners would have worked and received compensation for the final hours of their shift.

Respondent's Arguments

In its posthearing brief, the respondent concedes that it did not contest the order in question within the required 30 days. However, citing Secretary of Labor v. Quinland Coals, Inc., 9 FMSHRC 1614, 1620 (September 1987), the respondent points out that while it has the opportunity to contest the validity of the order at the civil penalty phase, MSHA has indicated there has been no civil penalty assessment proposed for the violation cited in the order, and that no assessment will be made. Further, citing Local Union 1810 v. Nacco Mining Company, 9 FMSHRC 1349 (August 1987), holding that a mine operator's rights under section 105(d) of the Act must be either exhausted or waived before the Commission may order compensation pursuant to section 111, the respondent suggests that it has not been given its full rights to contest the order and that the Commission does not yet have jurisdiction in this case. In the alternative, respondent points out that since MSHA has indicated that it would not be issuing a civil penalty assessment in this matter, and in light of the approval of its petition for modification, it appears that the order in question has been de facto vacated. If this is the case, respondent

further suggests that the Commission may proceed to decide this case.

With regard to the merits of the compensation claim, the respondent maintains that the idled miners are not entitled to compensation pursuant to section 111 of the Act because they were not idled by the order in question and the evidence fails to establish any nexus between the issuance of the order and the idlement and closure of the mine some two and one-half shifts after it was issued. Respondent points out that the UMWA has conceded that if the mine had been idled on January 29, 1988, until the modification petition was ultimately granted on February 11, 1988, there would be no case (Tr. 76-77), and that presumably, the local union membership would then have been without recourse for approximately 2 weeks of lost wages. Respondent suggests that the union would have the Commission "punish" the respondent for keeping its membership working through significant economic losses notwithstanding the fact that section 111 of the Act was not designed for this purpose.

In support of its position, the respondent asserts that in the absence of a nexus between a designated withdrawal order and the miners' idlement and loss of pay, or between the underlying reasons for the idlement and pay loss and the reason for the order, compensation pursuant to section 111 of the Act is not available. Respondent argues that section 111 is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations, or because of an imminent danger which was totally outside of their control. Quoting from Local Union No. 781 v. Eastern Associated Coal Corp., supra, respondent states that "mere occurrence, alone of withdrawal or idlement and issuance of an order does not, by itself, justify compensation," and that miners are considered to be idled by a withdrawal order whenever the order prevents them from working, Local Union 3454 v. Kanawha Coal, supra.

The respondent maintains that the overwhelming evidence in this case clearly shows that the cause of the idlement of the miners was due to the severe economic losses suffered by the mine from January 28, until February 9, 1988, and that as early as January 13, 1988, mine superintendent Toth advised the respondent's legal counsel that it would not be economically feasible to operate the mine at reduced productivity without the longwall, and that drastic workforce reductions would be inevitable. At approximately the same time, representatives of the UMWA union local and international were advised of the possibility of layoffs without the approval of

the modification petition. Since this occurred approximately 1 months before the mine was idled, the respondent concludes that the idlement of the mine was contemplated well in advance of the issuance of the order, and that the evidence shows a consistent approach by the respondent to the economic realities it faced.

Respondent states that the evidence establishes that mine management attempted to keep the mine open, and that when the operational longwall was mined out some 2 weeks before the order was issued, management opted to extend the panel some 300 feet so that the mine would not have to be idled. Although this action by management resulted in a 50 percent reduction of production capacity, and ended on February 3, 1988, when the coal could no longer be mined safely, the mine still remained open for approximately 1 week even with no longwall production.

Respondent points out that when the order was issued on February 8, 1988, the mine remained opened, and Inspector Kalich testified that he was neither withdrawing miners from the mine, nor was he withdrawing them from the 14 Rt. 3 South Longwall section. Contrary to the UMWA's contention that the order caused the mine to be idled, respondent maintains that the evidence shows that only a few miners assigned to the longwall section ever were idled, and that the obvious implication is that even after the mine was closed the workers at the affected section were never idled, and that the order did not prevent the miners from working.

The respondent views the UMWA's assertion that the sole reason for the idlement of the mine was the order issued by Inspector Kalich, as implausible in that "it would be a quantum leap in logic to presume" that the information communicated to the union by mine management relative to the economic implications of the failure to obtain the modification petition was somehow created by management to "jack with the union." If anything, the respondent concludes that management took a consistent approach to keep the mine open and to keep the union local's membership working. Since the UMWA has acknowledged the respondent's authority to close a mine if it is not profitable, respondent concludes that this authority presumably also applies to a section of the mine as well.

gical implication of the evidence is that the require the mine to be closed, respondent main- her factors were involved, namely the economic pressed in its January 13, 1988, correspondence, e meetings held with UMWA members.

Applying the Commission's observations in Local Union No. 781 v. Eastern Associated Coal Corp., supra, that it would "examine the relationship between the underlying reasons for the withdrawal and for the order, and will give balanced consideration both to the limited and purely compensatory character of section 111 and to the overall safety purposes of the 1977 Mine Act and section 111 itself," Id at pg. 1178, the respondent concludes that it is clear that the "safety" aspects of the Act, as well as section 111's mandate to pay compensation, are not at issue in this case because the order clearly never required the miners to be withdrawn and the alleged "safety" violation was remedied by shutting down the power.

Respondent concludes that the UMWA's evidence simply establishes that an order was issued, and, at some point, the mine was idled. Given the fact that the UMWA has conceded that if the mine were shut down on January 28, there would be no case, and assuming the mine were idled on February 3 or 8, or even the 9th, and no order had been issued, "then too there would be no case," respondent suggests that it would appear that the UMWA has conceded the central issue in this case, i.e., the mine without the modification petition could not operate profitably, and thus the order did not cause it to be idled. Since the respondent is under no obligation to continue to operate a mine which loses money, respondent believes that the UMWA's assertion that everyone at the mine should have been kept on, even though production was down some 75 percent, is contrary to the testimony of its witnesses and contrary to accepted practices in not only the coal industry, but in business in general, and must be rejected.

The respondent asserts that even if the implication that the decision to idle the mine was made to spur MSHA to act on the petition, there still would be no right to compensation because it may only be awarded when a miner is idled due to the issuance of a withdrawal order. Absent a nexus between the idlement and the order, there can be no compensation. Even assuming arguendo that the mine was idled to force MSHA to act on the petition for modification, respondent concludes that the order did not factor into the idlement decision. Even though mine management may have caused its economic concerns to become a self-fulfilling prophesy, the order would not be a factor which caused the mine to close. Respondent maintains that this case reflects a consistent approach on its part to keep the mine open, and that it communicated to all persons involved the economic consequences which would follow if the modification petition were not granted. When production declined, management kept its employees on, and even kept

them on after longwall production stopped even though it had no obligation to do so. Respondent concludes that mine management alone idled the mine after it determined that the losses were too great to continue to operate.

Findings and Conclusions

Section 111 of the Act is intended to provide limited compensation to miners who lose pay because of a withdrawal order. The first two sentences of section 111 state as follows:

If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift.

The compensation claims filed in this proceeding arise under the third sentence of section 111, which states as follows:

[I]f a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 of this title for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. (Emphasis added).

The fourth sentence of section 111, provides as follows:

[W]henever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated.

The evidence in this case establishes that the first section 104(d)(2) Order No. 2943582, was issued by Inspector Kalich at 6:25 p.m., on February 8, 1988, and the "area" affected by this order was the "14th Right 3 South Longwall Power Center." The order cited an alleged violation of mandatory safety standard 30 C.F.R. § 75.1002, and on its face stated that it was issued because of the respondent's failure to comply with one of the conditions stated in its then pending petition for modification, namely, item No. 7, which required overtemperature protection for a high-voltage neutral grounding resistor used in connection with a high-voltage circuit supplying the longwall power center. The cited condition was abated by the installation of the overtemperature device in question, and the order was terminated at 7:30 p.m., the same day it was issued. The order was subsequently vacated by Mr. Kalich on February 10, 1988, after his supervisor informed him that he could not support a violation based on the respondent's alleged failure to comply with one of the conditions associated with its then pending petition to modify the requirements of section 75.1002. Mr. Kalich confirmed this fact, and he also confirmed that he could not support a violation of section 75.1002, independent of the modification petition, and that the cited condition was not in violation of that standard.

With regard to the second section 104(d)(2) Order No. 2943583, issued by Inspector Kalich, the evidence establishes that it was issued at 6:30 p.m. on February 8, 1988, 5 minutes after the first one, and the "area" affected by this order was "the 2400 volt power circuits of the 14 Rt. 3 South Longwall." Inspector Kalich again cited an alleged violation of section 75.1002, and he confirmed that he issued the violation because he found some energized 2400 high voltage cables located inby the last open crosscut and within 150 feet of the

pillar workings. Although the order issued by Mr. Kalich makes reference to the outstanding modification petition, and Mr. Kalich later incorporated the language of the first order as part of the second one when he subsequently modified it on February 10, he confirmed that he based his second order on an alleged violation of section 75.1002, which prohibits locating high voltage cables inby the last open crosscut and less than 150 feet from pillar workings, rather than on the pending modification petition. The second order was subsequently terminated at 3:05 p.m., February 10, 1988, by another inspector who was regularly assigned to the mine. The justification for terminating the order simply states that "the petition for modification of the application of 30 C.F.R. § 75.1002 is granted, for the 14 Right through 17 Right, 3 South Longwall Panels only."

Inspector Kalich confirmed that the effect of both orders was to de-energize the power from the longwall power center, and with the power down, no coal could be mined on the longwall. He also confirmed that the miners could continue to work on "setup work," but he did not remain at the mine and simply "heard that men were laid off." Mr. Kalich conceded that he did not order any area of the mine closed, and that he never required the withdrawal of any miners. Mine Superintendent Toth confirmed that he was never advised that Mr. Kalich had closed the mine or ordered the withdrawal of any miners. The parties stipulated that the two orders restricted the respondent from operating the 14 Right 3 South Longwall panel, but that the rest of the mine continued to operate for 2-1/2 shifts and all of the affected miners were kept working without interruption performing longwall maintenance work and working on the other continuous mining sections after the orders were issued, until the mine was idled by Mr. Toth at 8:00 p.m., on February 9, 1988. The mine remained idle until midnight February 10, 1988, when the miners returned to work for the shift beginning at 12:00 a.m., February 11, 1988. The claimed compensation is for the 3-1/2 shifts which were idled by Mr. Toth.

The Finality Issue

Unlike the first two sentences of section 111 of the Act, which entitles idled miners to compensation for lost wages resulting from an order regardless of any review of the idling order, the third sentence of section 111 contains two conditions which must be met before compensation attaches. The first condition requires a showing that the order was issued because of the mine operator's failure to comply with a mandatory health or safety standard, and the second condition

limits the availability of any compensation to an order which has become final after an "opportunity for a public hearing."

The parties have stipulated that the respondent did not avail itself of its right pursuant to section 105(d) of the Act to contest the orders issued by Inspector Kalich. Addressing itself to the second order issued by Mr. Kalich (No. 2943583), the UMWA maintains that since the respondent did not contest the order within 30 days of its issuance, it has waived its right to further challenge it, and the order has become final. Since it is final, the UMWA concludes that jurisdiction attaches, compensation is due, and that the next critical issue to be resolved is whether or not a nexus existed between the order and the miners who were idled. (I take note of the fact that the UMWA's posthearing arguments are limited only to the second order issued by Mr. Kalich).

The respondent's posthearing arguments are also limited to the second order issued by Inspector Kalich. Conceding that it did not contest this order within the required 30 days, respondent maintains that since it had not exhausted its right to a review of the order in a civil penalty proceeding pursuant to the Commission's Quinland Coals, Inc., decision, the order is not final and jurisdiction to consider the compensation claims is lacking. Alternatively, given the fact that its petition for modification of the cited section 75.1002 has now been granted, and the fact that MSHA will not initiate a civil penalty proceeding, respondent suggests that the order has been de facto vacated, and that the Commission may proceed to decide this matter.

The section 104(d)(2) unwarrantable failure orders issued by the inspector in this case alleged violations of mandatory safety standard 30 C.F.R. § 75.1002. Pursuant to the third sentence of section 111, miners idled as a result of an order issued for the unwarrantable failure of an operator to comply with any mandatory health or safety standard are entitled to compensation for such time as they are idled, or for 1 week, whichever is the lesser, and jurisdiction to hear and decide such claims attaches after the order has become final. Commission review of such an order is governed by the procedures found in section 105 of the Act, and the Commission Rules, and not by section 111.

Section 105 of the Act provides an operator with two opportunities to contest an order issued pursuant to section 104, and to request a hearing concerning any alleged violation which prompted the issuance of the order. Subsection (d) of section 105 affords an operator with an opportunity to

immediately contest an order within 30 days of its receipt. Subsection (a) of section 105 allows the operator to initiate a contest with respect to any civil penalty proposal filed by MSHA for the alleged violation stated in the order, and this may be done within 30 days of MSHA's notification of the proposed civil penalty assessment. In the Quinland Coals, Inc. case, supra, 9 FMSHRC at 1621-22, the Commission held that an operator may challenge the fact of violation and any special findings made in a section 104 order regardless of whether it availed itself of the opportunity to contest the order in which the allegation of violation is contained. See also: Local Union 2333, District 29, UMWA v. Ranger Fuel Corporation, 10 FMSHRC 612, 618 (May 1988).

The Ranger Fuel case involved a compensation claim filed by the union pursuant to the third sentence of section 111 of the Act. The Commission held that in a compensation proceeding, an operator may not challenge the validity of a violation after it has paid the civil penalty assessment because it would improperly place the miners and their representatives in a prosecutorial role to prove the violation, and would require them to perform functions properly resting within MSHA's domain, 10 FMSHRC, at pg. 619. The Commission went on to state that the issue of causal nexus in a compensation case is independent of the allegation of a violation and must be determined separately in order to determine entitlement to compensation under the third sentence of section 111. It concluded that an operator may litigate in a compensation proceeding the issue of the causal relationship between the order and the idlement of miners, but not the fact of violation.

The parties have stipulated that the respondent did not contest the orders pursuant to the available review procedures found in section 105(d) of the Act, and the Commission's Rules. Insofar as its available rights under section 105(d) are concerned, I agree with the UMWA's assertion that the respondent has waived its rights under this section, and to this extent, the orders are final. With regard to the respondent's contest rights in a civil penalty proceeding pursuant to section 105(a) of the Act, I recognize the fact that it has not yet had an opportunity to avail itself of an opportunity to challenge the orders in any civil penalty proceeding pursuant to the Commission's decision in Quinland Coals, supra. However, on the facts of this case, it does not appear that the respondent will ever have an opportunity to challenge the orders in any civil penalty proceeding because no such proceeding will be initiated by MSHA. The UMWA's counsel confirmed that she was informed by MSHA's district office that MSHA does not intend to file any civil penalty proposal with respect to

Order No. 2943583, because of the fact that the modification petition which was pending at the time the order was issued was subsequently granted (Tr. 101). Since MSHA was not a party to this proceeding, no further information or explanation was forthcoming with respect to MSHA's apparent reluctance or refusal to initiate a civil penalty proceeding with respect to the order and the alleged violation.

With regard to the first order (No. 2943582), the record reflects that it was terminated within an hour of its issuance, and subsequently vacated. The inspector candidly conceded that the conditions cited in the order, including an alleged violation of mandatory standard 30 C.F.R. § 75.1002, could not be supported, and that no violation existed, notwithstanding the respondent's immediate abatement of the cited condition. Since the order was obviously invalid, and no violation ever existed, one can reasonably conclude that no civil penalty assessment will be forthcoming, and the respondent would have no reason to challenge it further. Further, given the fact that the mine continued to operate for 2-1/2 shifts after the order was issued, and since the order was immediately terminated, it did not exist and was no longer in effect at the time the miners were idled.

With respect to the second order (No. 2943583), the inspector confirmed that he issued it because he believed that the cited conditions constituted a violation of mandatory standard 30 C.F.R. § 75.1002, independent of any reference to the pending modification petition. Although the record reflects that the order was subsequently terminated on February 10, 1988, upon approval of the modification petition, it was still outstanding and in effect when the miners were idled, and there is no evidence that MSHA has ever vacated it. The respondent's suggestion that the approval of the modification petition has resulted in a de facto vacation of the order is rejected. If the respondent believed that this was the case, it was incumbent on the respondent to present credible and probative evidence or facts to support such a conclusion, and none were forthcoming during the course of the hearing. I find nothing in the record to support any conclusion that MSHA ever vacated the order or made any finding that no violation ever existed. Although an MSHA inspector terminated the order, and "justified" it by a reference to the fact that the modification petition had been granted, he was not the same inspector who issued the order and violation, and the issuing inspector's credible testimony that a violation had occurred and that he cited a violation of section 75.1002 independently of the modification petition stands unrebutted. I take note of the respondent's further suggestion that assuming the order

were de facto vacated, the Commission could proceed to adjudicate the compensation claim.

The respondent's reliance on the Quinland Coals decision as the basis for its argument that the Commission lacks jurisdiction to decide the compensation claim because it has not been afforded its full rights to contest the order in any civil penalty proceeding IS REJECTED. In my view, the Quinland Coal decision simply expanded the appeal rights afforded a mine operator to challenge the validity of special findings made by an inspector in a contested order. The Commission rejected a restrictive interpretation of the review provisions of section 105 of the Act, and concluded that since a special finding was a critical consideration in evaluating the nature of an alleged violation and its impact upon the appropriate civil penalty to be assessed, an operator should have an opportunity to seek review of an order in any subsequent civil penalty proceeding pursuant to section 105(a) of the Act, notwithstanding the fact that it failed to seek review pursuant to section 105(d). The focus of the Commission's decision in Quinland Coals was on the interrelationship between a contest proceeding and a civil penalty proceeding, and not on section 111 of the Act.

On the facts of this case, I believe it would be unjust to deny the miners an opportunity to have their compensation claims adjudicated because of MSHA's reluctance to initiate a civil penalty proceeding which may afford the respondent a forum to litigate the validity of the order or the fact of violation. The respondent's liability for the compensation claims are to be adjudicated pursuant to the remedial purposes of section 111, and not the punitive enforcement statutory and regulatory schemes connected with the issuance of citations, orders, and civil penalty assessments. Further, the fact that a withdrawal order is subsequently vacated does not deprive miners of their right to compensation, CF&I Steel Corp. v. Morton, 516 F.2d 868 (10th Cir. 1975).

Section 111 is remedial in nature and was not intended by Congress to be interpreted and applied narrowly. Local Union 1889, District 17, UMWA v. Westmoreland Coal Company, 8 FMSHRC 1317 (September 1986). In a recently decided compensation case before the United States Court of Appeals for the District of Columbia Circuit, International Union, UMWA v. FMSHRC, 840 F.2d 77, 82 (D.C. Cir. 1988), the court observed that the legislative history of section 111 makes it clear that its purpose was to make miners whole for wages lost due to a closure order or for wages lost through no fault of their own. The court pointed out that section 111 was not intended to be a part of the Act's civil penalty assessment scheme, and

that the statutory language accords the Secretary (MSHA) no role in determining section 111 liability. The court further concluded that section 111 is self-executing, and that once a section 104(d)(2) order based on a violation of a mandatory health or safety standard is issued and causes the miners to be idled, the miners have a right to seek compensation, and that such a right may be vindicated through recourse to the Commission.

In this case, the issuance of the unwarrantable failure orders came about through no fault of the miners. Both orders were issued because of the conduct of the respondent in energizing the longwall section and exposing the area to certain conditions which the inspector believed were in violation of mandatory section 75.1200 and/or contrary to the modification petition which had not been granted at the time of the inspection which prompted the action taken by the inspector. Further, MSHA's inaction in failing to initiate a civil penalty proceeding likewise came about through no fault of the miners.

On the facts of this case, and in light of the foregoing findings and conclusions, I conclude and find that for purposes of the instant section 111 proceeding, the orders in question have become final, and that I have jurisdiction to adjudicate the compensation claims.

The Nexus Issue

The prerequisites for entitlement to compensation for section 104 orders which result in the idling of miners are found in section 111 of the Act, and the conditions precedent for the awarding of compensation is that the mine is idled by the issuance of an order which cites a violation. In short, section 111 of the Act creates a graduated scheme of compensation ranging from the limited shift compensation described in the first two sentences, to the more generous 1-week compensation provided by the third sentence, all of which are dependent on the mine operator's conduct relating to the conditions in the mine. Shift compensation is awardable for an idlement attributable to an order issued under section 104 of the Act, and up to 1-week's compensation is available if the idlement is attributable to a section 104(d)(2) order issued for an unwarrantable failure by the operator to comply with a cited mandatory standard, Westmoreland Coal Company, supra, 9 FMSHRC 1325.

In order to establish its claim to compensation, the UMWA must establish that a nexus existed between the orders and the

idling of the miners. As stated by the Commission in Local Union No. 781, District 17, UMWA v. Eastern Associated Coal Corp., 3 FMSHRC 1175, 1178:

[S]ection 111 compensation is awardable only if there is a nexus between a designated withdrawal order and the miners' idlement and loss of pay, or between the underlying reasons for the idlement and pay loss and the reasons for the order. Mere occurrence alone of withdrawal or idlement and issuance of an order does not, by itself, justify compensation Where an order precedes and plainly causes a withdrawal leading to loss of pay, compensation ordinarily will be awarded; conversely, . . . where the order has nothing to do with the withdrawal . . . compensation will not be awarded. However, withdrawal situations can arise involving more complicated sequences of events or concurrent operation of causative factors. In resolving the latter class of cases, we think it wiser to develop the nexus rule on a case-by-case basis. In such cases, we will examine the relationship between the underlying reasons for the withdrawal and for the order, and will give balanced consideration both to the limited and purely compensatory character of section 111 and to the overall safety purposes of the 1977 Mine Act and section 111 itself. (Emphasis added).

It is well-settled that the voluntary closure of a mine by an operator, and the withdrawal of miners prior to the issuance of an order does not preclude the miners from receiving compensation based on the order. UMWA, District 31 v. Clinchfield Coal Company, 1 MSHC 1010 (1971); Mine Workers, Local 2244 v. Consolidation Coal Company, 1 MSHC 1674 (1978); Mine Workers, Local 1993 v. Consolidation Coal Company, 1 MSHC 1668 (1978).

In the Clinchfield Coal Company case, supra, in rejecting the operator's contention that its voluntary closure of the mine prior to the issuance of the closure order preempted the former Interior Board of Mine Operations Appeals withdrawal order is more extensive in scope than withdrawal of miners by the operator, in that it stays until the Secretary determines that the order exists, and the mine or particular section officially closed upon the issuance of an order,

and the effected miners are officially idled by such an order. See also: Mine Workers, Local 1993 v. Consolidation Coal Company, supra, where Judge Broderick followed the Clinchfield Coal Company decision in concluding that the mine operator's voluntary closure of the mine in advance of the issuance of the order was strongly motivated by the increasing probability that a closure order would be issued. The instant case presents a unique situation in that the orders issued by the inspector did not directly order any withdrawal of miners or the closing of the mine, and the miners continued to work for 2-1/2 shifts after the orders were issued until the mine superintendent subsequently closed the mine.

Order No. 2943582

Inspector Kalich issued Order No. 2943582, at 6:25 p.m., on February 8, and terminated it at 7:35 p.m. that same day after the respondent installed a ground check circuit overtemperature device. The inspector subsequently vacated the order on February 10, on the instructions of his supervisor who advised him that he could not support a violation based on a pending modification petition. During the course of the hearing, the UMWA's representative asserted that the inspector "messed up" when he issued the order (Tr. 102).

While it is true that a subsequently vacated order may not deny miners their right to claim compensation, in this instance the mine continued to operate for two and one-half shifts after the order was terminated, all of the miners continued to work, and no one was ordered to be withdrawn or idled. Further, the inspector conceded that the cited condition did not constitute a violation of the cited mandatory safety standard, section 75.1002, and any possible hazard to which the miners assigned to the longwall panel may have been exposed was effectively eliminated when the respondent took immediate action to install the overtemperature device as required by the inspector. In addition, at the time of the subsequent idlement of the entire mine by the mine superintendent on February 9, the order was no longer in effect or in existence. Under all of these circumstances, I cannot conclude that any nexus has been established between Order No. 2943582, and the idlement of the miners on February 9, 1988.

Order No. 2943583

Section 111 of the Act provides for compensation for miners when a mine or mine area is closed by a section 104

order. The evidence in this case establishes that the inspector did not order the closure of the entire mine or the longwall area of the mine, nor did he order the withdrawal of any miners. The parties have stipulated that the mine continued to operate for 2-1/2 shifts after the order was issued until it was idled by superintendent Toth on February 9. Superintendent Toth's unrebutted and credible testimony establishes that notwithstanding the unavailability of power on the longwall panel, all miners assigned to the longwall were kept working, and the UMWA agreed that all mine shifts continued to work without interruption for 2-1/2 shifts after the order issued, and that the miners assigned to the longwall continued doing "dead work" (Tr. 92).

During the course of oral argument on the record, the UMWA's representative asserted that as a result of Inspector Kalich's order, some miners were idled from work (Tr. 33). When asked to identify these miners, she confirmed that they were the miners listed on "Exhibit F" to the prehearing Joint Stipulation of facts which were filed and received on October 11, 1988, "which we've all agreed to" (Tr. 34). The list contains the names of 432 individuals assigned to work in the plant and the mine from February 9, through February 10, 1988. Eleven (11) of those listed were assigned to the longwall on February 9, 1988 (Tr. 88). Having reviewed the stipulation, and contrary to any inference by the UMWA's representative that the parties stipulated that the miners listed were idled by the order, my conclusion is that the parties stipulated that these miners were idled from 8:00 p.m., on February 9, 1988 to midnight February 10, 1988, as a result of Mr. Toth's decision to idle the mine, rather than the order issued by the inspector.

Superintendent Toth testified that the mine is equipped to operate one longwall installation, and four belt and continuous miner sections, and that in order to maintain its profitability, 12,000 to 14,000 tons of coal a day must be produced (Tr. 49). He confirmed that by January 28, 1988, one longwall panel had been completed and ready for production, but that no coal could be produced because the pending modification petition had not as yet been approved. However, work continued, *** "ra manpower was used to extend the panel an additional t in anticipation of the approval of the petition (Tr. e confirmed that during this time, production levels "50 percent efficiency," and that on February 3, in considerations, further coal production ceased . and from February 3 to February 9, when he there was no further longwall production (Tr. his longwall coal production records,

Mr. Toth confirmed that from January 29 to February 3, coal production was reduced by 70,000 tons a day, and that from February 3, until February 9, production was reduced by 40,000 tons a day (Tr. 55). He also confirmed that the four continuous miner sections accounted for 25 percent of total coal production (Tr. 86).

Mr. Toth confirmed that from February 3, until the afternoon shift of February 9, no miners were idled, and "preparation and setup" work continued on the longwall, as well as in all of the other available developments (Tr. 56). He confirmed that those longwall miners who were subsequently idled by his decision to idle the mine were involved in the "set-up and adjustment work" which was going on (Tr. 80). Mr. Toth explained that the high voltage power was on the longwall panel in question on February 8, in order to make necessary adjustments to the power cables and "trim passes" in anticipation of starting up the longwall once the petition was granted, but that he had no intention of starting any coal production on the panel without the petition being granted (Tr. 57-58; 62). Mr. Toth also confirmed that the power was also on the longwall panel on February 4 and 5, even though the modification petition was still pending, and he explained that it was on while MSHA inspectors were present evaluating the modification petition (Tr. 65-66).

The petition of modification in question was filed to permit the respondent to use high voltage power on the longwall panel. When the order was issued, the petition had not been granted, and the use of high voltage power was not permitted. Inspector Kalich testified that while this was true, he issued the order because he believed the use of high voltage cables on the longwall was a violation of mandatory safety standard section 75.1002, independent of the then pending petition. The merits of the alleged violation were not litigated in this compensation proceeding, and the parties differ as to whether or not the cited conditions constituted a violation of section 75.1002 (Tr. 103, 106-107). The UMWA takes the position that the failure by the respondent to timely contest the alleged violation constitutes a tacit admission of a violation. This contention is rejected. I find no basis for such a conclusion, and given the Commission's decision in the Quinland Coals, Inc., case, supra, I believe that the respondent's belief that it could still litigate the merits of the alleged violation in any subsequently filed civil penalty proceeding, notwithstanding its failure to timely contest the violation, is reasonable and plausible.

Aside from the merits of the alleged violation, and from a safety point of view, the decision by the respondent to introduce high voltage on the longwall without approval by MSHA, exposed the miners assigned to the longwall to a potential hazard. Indeed, the inspector who issued the order believed that the use of high voltage cables on the longwall was contrary to mandatory safety standard 75.1200, and he concluded that the alleged violation was "significant and substantial" and presented a reasonable likelihood of an injury.

The parties do not dispute the fact that while the order did not directly require the withdrawal of any miners or the closure of the longwall area of the mine, it did result in the shut down of the 2400 volt power circuits supplying power to the longwall area. In the absence of available power, normal longwall production could not continue, and miners normally assigned to their normal longwall production duties could not continue performing those duties and were assigned "dead work." Any attempt by the respondent to continue full production on the longwall with use of high voltage power in defiance of the order would have placed the respondent at risk to pay the increased compensation to the affected miners working in the longwall area as provided for in the fourth sentence of Section 111. Thus, the net effect of the order was to curtail further coal production in the longwall area. Under all of these circumstances, including the fact that the order was still in effect and had not been terminated or vacated at the time superintendent Toth decided to idle the entire mine on February 9, I conclude and find that a causal relationship did exist between the order and the idling of the longwall area, and that the proximate and primary cause of the idling of that area was the order issued by the inspector.

I conclude and find that the evidence in this case establishes a reasonable nexus between the order and the idling of the longwall area, notwithstanding the respondent's "economic considerations" arguments to the contrary. Accordingly, I further conclude and find that the miners normally assigned full production work duties on the 14 Right 3 South Longwall Section, and who would have continued performing these duties but for the issuance of the order in question, are entitled to be compensated for the time the longwall area was idle from 8:00 p.m. on February 9, to midnight February 10, 1988.

With regard to the mine areas other than the longwall, while it is true that the order affecting the longwall was still outstanding and in effect when superintendent Toth

decided to idle the entire mine on February 9, the facts establish, and the UMWA concedes, that the continuous mining sections continued to operate for 2-1/2 shifts after the order was issued. Miners continued to work in these areas, and coal production continued, albeit at reduced efficiency, but still unaffected by the order. Unlike the longwall area, where coal production was substantially reduced because of the unavailability of high voltage power which came about as a result of the order, the continuing mining sections continued to operate for 2-1/2 shifts, and no miners were idled.

With regard to any safety connection between the order and the remaining mine areas other than the longwall, the evidence establishes that any potential hazards to miners through exposure to the cited high voltage cables was limited to the longwall area, and I find no evidence to support any conclusion that any of the miners who continued to work in these other mine areas were at risk or exposed to any potential hazard because of the alleged violation which prompted the inspector to issue the order on the longwall.

Although I have concluded that the order issued on the longwall was safety related, and that a reasonable nexus has been established between the order and the idling of the longwall area of the mine, I cannot reach the same conclusion with respect to the remaining mine areas which were unaffected by the order. On the facts of this case, I conclude that the respondent has made a credible, plausible, and reasonable showing with respect to the adverse economic impact on the mine which resulted from its failure to gain timely approval of its modification petition.

The evidence in this case establishes that the adverse economic impact on the continued viable operation of the mine as a result of the respondent's failure to obtain timely approval of its longwall modification petition was clearly communicated to the union well in advance of the issuance of the order, and it came to fruition at a time when the respondent was attempting to continue mining by extending the longwall in anticipation of MSHA's approval of the petition, which the respondent believed was imminent, and at a time when there was little or no ongoing production on the longwall, even before the order was issued.

While it is true that the respondent precipitated the issuance of the order by advancing high voltage cables into the longwall area, given the remedial nature of section 111 of the Act, and the fact that no miners working in areas other than the longwall were exposed to any hazard as a result of

the alleged violation, and notwithstanding the fact that the order was still in effect at the time Mr. Toth decided to idle the entire mine on February 9, I conclude and find that the order was incidental to, and not the immediate cause of the idling of the rest of the mine by Mr. Toth. To the contrary, I conclude and find that Mr. Toth's decision to idle the mine was primarily the result of his managerial decision that he could not continue to economically operate the mine, and his obvious frustration and aggravation over the failure to gain timely approval of the then pending modification petition.

The respondent's credible evidence clearly supports its contention that for a period of approximately 1-month prior to the issuance of the order on February 8, and Mr. Toth's decision of February 9, to idle the entire mine, representatives of the UMWA were on notice by the respondent that drastic workforce reductions were inevitable in the event the pending modification petition was not timely approved by MSHA. Respondent's credible evidence also establishes that at the time the longwall panel in question was mined out approximately 2 weeks before the order was issued, coal production on the longwall showed a marked decrease. The reasons for this was the fact that all of the longwall coal had been mined up that point, and the respondent had not as yet had approval from MSHA to introduce high voltage on the panel which would have allowed it to continue mining at a high production capacity. Notwithstanding these factors, the respondent decided to extend the panel an additional 300 feet in anticipation of the approval of its petition, and miners were kept working at reduced productivity levels until superintendent Toth decided that he could no longer justify operating the mine with a full employment complement in the face of decreased production and the lack of high voltage capability on the longwall.

Under all of the aforementioned circumstances, I cannot conclude that a reasonable nexus existed between the issuance of the order and Mr. Toth's decision to idle the entire mine. Accordingly, I further conclude and find that those miners assigned to and working in mine areas other than the longwall area are not entitled to any compensation as a result of Mr. Toth's idlement of the mine.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED THAT:

1. The affected miners assigned to the 14 Right 3 South Longwall Section of the mine as of February 9, 1988, as shown

in Exhibit "F" to the Joint Stipulation of Facts filed by the parties in this proceeding, are entitled to compensation at their regular rates of pay for wages lost during the idlement of the mine, from 8:00 p.m. on February 9, 1988 to midnight February 10, 1988, with interest computed from February 9, 1988, until the date payment is made, and to this extent the compensation claims filed in this proceeding ARE GRANTED.

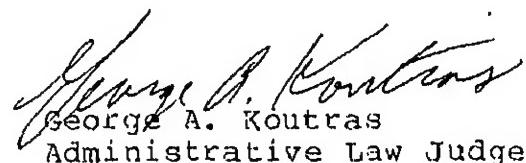
All interest due with respect to the claims which have been allowed shall be calculated in accordance with the Commission's decision in Arkansas-Carbona, 5 FMSHRC 2042 (December 1983), as modified by Local Union 2274, District 28, UMWA v. Clinchfield Coal Company, 10 FMSHRC 1493 (November 1988). See: 54 Fed. Reg. 2226-2227, January 19, 1989.

2. All other miners working in areas other than the 14 Right 3 South Longwall Section of the mine during the aforementioned idlement period of the mine are not entitled to compensation, and to this extent, the compensation claims filed in this proceeding ARE DENIED.

3. Within twenty (20) days of the date of this decision, and without prejudice to the right of the parties to seek further review of this decision, the parties shall confer in an effort to stipulate to the amounts of compensation and interest due the aforementioned longwall miners, and within ten (10) days thereafter, the parties shall file their joint stipulation or agreement in this regard with me so that a supplemental decision and final order may be entered.

4. The UMWA's request for payment of attorney's fees IS DENIED. Section 111 of the Act does not provide for an award of attorney's fees and costs in compensation proceedings. See: Local Union 2274, District 28, United Mine Workers of America v. Clinchfield Coal Company, 10 FMSHRC 1493, 1499 (November 1988), and the cases cited therein.

5. This decision shall not be made final until the parties have submitted their joint stipulation and agreement, and a supplemental decision and final order is issued.


George A. Koutras
Administrative Law Judge

Distribution:

Joyce A. Hanula, Legal Assistant, United Mine Workers of America, (UMWA), 900 15th Street, N.W., Washington, DC 20005 (Certified Mail)

Eugene P. Schmittgens, Jr., Esq., Eastern Associated Coal Corporation, 301 N. Memorial Drive, Post Office Box 373, St. Louis, MO 63166 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 7 1989

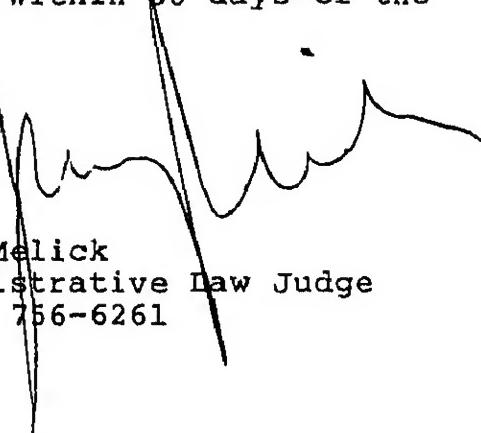
DONALD F. DENU, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 88-123-D
: VINC - CD 88-08
AMAX COAL COMPANY : Ayrshire Mine
Respondent :
:

ORDER

Appearances: Donald F. Denu, Rockport, Indiana,
pro se;
D. C. Ewigleben, Esq., Amax Coal Company,
Indianapolis, Indiana for Respondent

Before: Judge Melick

By decision dated March 3, 1989, the Discrimination Complaint of Donald F. Denu was granted. The parties subsequently reached agreement as to costs and damages at \$1,000. Accordingly Amax Coal Company is directed to pay to Donald F. Denu the amount of \$1,000 within 30 days of the date of this order.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Donald F. Denu, R.R. #1, Box 333, Rockport, IN 47635
(Certified Mail)

D. C. Ewigleben, Esq., Amax Coal Company, P.O. Box 967,
Indianapolis, IN 46206-0967 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 7 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-79
Petitioner	:	A.C. No. 12-01986-03504
v.	:	
	:	Hunley Creek
SUPER BLOCK COAL CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the
Solicitor, U.S. Department of Labor, Chicago,
Illinois, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of \$20 for an alleged violation of mandatory safety standard 30 C.F.R. § 77.1109(c)(1). The respondent filed a timely answer and contest and a hearing was convened in Evansville, Indiana. However, the respondent failed to appear, and the hearing proceeded in his absence, and testimony and evidence was submitted by the petitioner in support of the alleged violation. A show cause was subsequently served on the respondent affording it an opportunity to explain its failure to appear at the hearing, but no response was received. Under the circumstances, pursuant to Commission Rule 63, 29 C.F.R. § 2700.63, the respondent is deemed to be in default.

Issues

The issues presented in this case are (1) whether the condition or practice cited by the inspector constitutes a violation of the cited mandatory safety standard, and (2) the appropriate civil penalty to be assessed for the violation,

taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Discussion

Section 104(a) non-"S&S" Citation No. 3038275, issued on January 19, 1988, cites a violation of mandatory safety standard 30 C.F.R. § 77.1109(c)(1), and the cited condition or practice states as follows: "A portable fire extinguisher was not provided for the Ingersoll-Rand T-4 highwall drill. Work area I.D. No. 900-0."

MSHA Inspector Keith L. Stoner testified as to his background and experience, and he confirmed that he issued the citation in question during the course of a regular inspection which he conducted at the mine on January 19, 1988. He stated that the coal stripping superintendent, Danny Jasper, was present at the mine and was aware of his inspection. Mr. Stoner confirmed that he issued the citation after finding that a rubber-tired drill truck was not equipped with a portable fire extinguisher as required by the cited standard. He stated that the drill apparatus is an integral part of the truck, and he considered it to be a mobile piece of equipment within the meaning of the standard.

Mr. Stoner confirmed that the truck was parked approximately 100 feet from the repair garage, but that it was not tagged out. Other pieces of equipment parked near the garage were equipped with fire extinguishers, and the cited drill was the only piece of equipment which was not provided with one. Except for the lack of a fire extinguisher, the drill truck appeared to be in normal and good operating condition. The truck was equipped with a bracket which normally is used to hold an extinguisher in place. Mr. Stoner confirmed that he spoke with Mr. Jasper about the matter, and Mr. Jasper informed him that he did not believe that an extinguisher was required because the drill truck was not in use when the inspector observed it.

Mr. Stoner stated that the violation was not significant and substantial, and he believed that an injury was unlikely

because the drill was not in use and no one was around it at the area where it was parked. He made a negligence finding of "moderate" because the other equipment was provided with fire extinguishers, and abatement was achieved within 5 minutes when a spare extinguisher located in the repair garage was placed on the drill truck in the bracket which was provided for this purpose.

Findings and Conclusions

Fact of Violation

The respondent is charged with a violation of mandatory safety standard 30 C.F.R. § 77.1109(c)(1), for failure to provide a portal fire extinguisher for the highwall drill in question. Section 77.1109(c)(1) provides as follows: "Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher."

As noted earlier, the respondent failed to appear at the hearing in this matter, and failed to respond to my show cause order of March 14, 1989. The returned postal service certified mail receipts of record reflect that the respondent received the initial hearing notice, the amended hearing notice, and the show cause order. However, it has not further responded or explained its absence and failure to respond. Under all of these circumstances, I conclude and find that the respondent is in default and has waived its right to be heard further in this matter.

On the basis of the credible testimony of the inspector who issued the citation, I further conclude and find that the petitioner has established a violation of section 77.1109(c)(1), and the citation is therefore AFFIRMED.

Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The respondent appears to be a small mine operator, and absent any information to the contrary, I conclude and find that the \$20 civil penalty assessment for the violation in question will not adversely affect its ability to continue in business.

History of Prior Violations

A computer printout submitted by the petitioner reflects that for the period March 21, 1986 to March 20, 1988, the

respondent paid civil penalty assessments in the amount of \$960 for 17 section 104(a) citations, none of which include prior violations of mandatory safety standard section 77.1109(c)(1). I cannot conclude that the respondent's compliance history is such as to warrant any additional increase in the civil penalty assessment made for the violation which has been affirmed in this case.

Good Faith Compliance

I conclude and find that the respondent immediately abated the violation in good faith by providing a fire extinguisher for the cited drill in question.

Negligence

The inspector's "moderate" negligence finding is affirmed.

Gravity

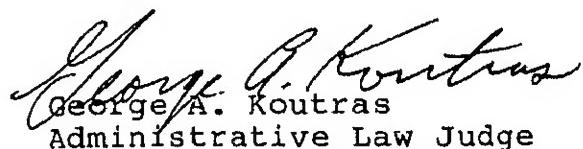
The inspector's credible testimony establishes that the violation was not serious, and I adopt his finding as my finding and conclusion on this issue.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the petitioner's proposed civil penalty assessment in the amount of \$20 for the violation in question is reasonable and appropriate, and IT IS APPROVED.

ORDER

The respondent IS ORDERED to pay to the petitioner a civil penalty assessment in the amount of \$20 for a violation of mandatory safety standard 30 C.F.R. § 77.1109(c)(1), as stated in section 104(a) "non-S&S" Citation No. 3038275, January 19, 1988. Payment is to be made to the petitioner within thirty (30) days of the date of this decision and order, and upon receipt of payment, this case is dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

Miguel J. Carmona, Esq., Office of the Solicitor, U.S.
Department of Labor, 230 South Dearborn Street, 8th Floor,
Chicago, IL 60604 (Certified Mail)

Mr. Larry Wallace, President, Super Block Coal Corporation,
Post Office Box 234, Crestwood, KY 40014 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 7, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 89-8-M
Petitioner	:	A. C. No. 19-00970-05501
	:	
v.	:	Chelmsford Mill
	:	
POMERLEAU BROTHERS, INC.,	:	
Respondent	:	

DECISION
ORDER TO PAY

Appearances: David L. Baskin, Esq., Office of the Solicitor,
U. S. Department of Labor, Boston, Massachusetts,
for Petitioner.

Before: Judge Merlin

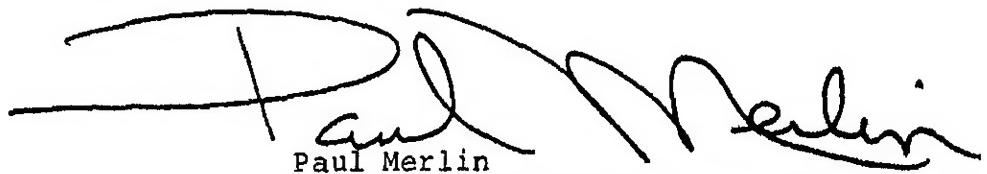
This case is a petition for the assessment of three civil penalties filed by the Secretary of Labor against Pomerleau Brothers, Inc. At the hearing, the Solicitor advised that the parties had agreed upon settlement recommendations of all items for the originally assessed amounts. The Solicitor placed the recommendations on the record. The hearing in this matter took place at the same time as another case which was heard on the merits.

Citation Nos. 2853598 and 2853599 were issued for violations of 30 C.F.R. § 56.9087 and § 56.9011, respectively. Upon a review of the record, I am satisfied that the proposed single penalty assessments which are the original amounts are appropriate for these items.

Order No. 2853597 was issued for a violation of 30 C.F.R. § 56.9003 because the No. 35 Euclid truck had not been equipped with adequate brakes. The proposed settlement is for the \$500 originally assessed penalty. MSHA found that the gravity of the violation was serious, because it created the danger of a haulage accident. The service brakes on the rear wheels did not function and the hand brake could not hold the empty truck on the ramp at the primary crusher. Under such circumstances the machine could have run out of control. In addition, the operator was negligent since a routine examination of the machine would have revealed this condition. The operator is small with no prior history. However, in view of the substantial degree of gravity and the

existence of negligence, I conclude \$500 is an appropriate penalty amount for this violation.

In light of the foregoing, the recommended settlements are APPROVED and the operator is ORDERED TO PAY \$540 within 30 days from the date of this decision.



Paul Merlin
Chief Administrative Law Judge

Distribution:

David L. Baskin, Esq., Office of the Solicitor, U. S. Department of Labor, John F. Kennedy Federal Building, Government Center, Room 1803, Boston, MA 02203 (Certified Mail)

Pomerleau Brothers, Inc., Box 236, North Chelmsford, MA 01863 (Certified Mail)

/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 11 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-103
Petitioner	:	A.C. No. 15-14587-03536
v.	:	
STERLING ENERGY, INC.,	:	Docket No. KENT 88-169
Respondent	:	A.C. No. 15-14587-03540
	:	Docket No. KENT 88-208
	:	A.C. No. 15-14587-03544
	:	Sterling No. 5 Mine

DECISION

Appearances: Mary Sue Ray, Esq., and William F. Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner; Mr. Ralph Ball, President, Sterling Energy, Inc. LaFollette, Tennessee, for the Respondent.

Before: Judge Maurer

These cases are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", to challenge two citations, one issued under section 104(a) of the Act, the other under section 104(d)(1) of the Act, one imminent danger withdrawal order, seven section 104(d)(1) orders and a single section 104(d) (2) order. The respondent also seeks review of the civil penalties proposed by the Secretary of Labor for the related violations.

Pursuant to notice, the cases were heard in Knoxville, Tennessee on February 21, 1989.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept:

1. Sterling Energy, Inc., owns and operates the No. 5 Mine, which produces coal for resale in interstate commerce and is subject to the jurisdiction of the Act.

2. The undersigned administrative law judge has jurisdiction over this proceeding pursuant to Section 105 of the Act.

3. The subject citations and orders were properly served on the respondent by a duly authorized representative of the Secretary.

4. Copies of the subject citations and orders entered into this record as petitioner's exhibits are authentic copies of the originals.

I. Docket No. KENT 88-103

Citation No. 3001604, issued on September 11, 1987, pursuant to Section 104(a) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.200 and charges as follows:

The roof on 002-0 pillaring section was loose and had sloughed out around the roof bolts as much as 12" from the plates, where the employees had cleaned up and had trammed the miner part of the way to start producing coal.

The cited standard, 30 C.F.R. § 75.200, provides in pertinent part as follows:

The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

According to Inspector Osborne, an MSHA coal mine inspector, the roof in the cited area was loose and 12-14 inches of material had sloughed out around one full row of bolts on one side. At the time he observed this condition, the operator was engaged in moving equipment through this area and one man was observed directly underneath where this roof had sloughed out. It was stipulated that there were four people on the section, that there was robbing work going on, taking the pillars out, and that the operator was planning on using this as a haulage road.

The inspector assessed the gravity of the violation as highly likely to produce or result in a lost work days or restricted duty accident involving four persons because, in his words, "it's a real tender top" and they were doing robbing work at the time.

Mr. Ball, testifying on behalf of the respondent, agreed that action should have been taken in this area, but that he didn't see anything particularly serious about it. He believes that if he would have put up three or four timbers, he could have went ahead and used it as a roadway. His rationale for that position is that they were using 60-inch resin bolts in this area as opposed to 42-inch "traditional bolts".

The Secretary also presented the testimony of Mr. Roger Dingess, a roof control and ventilation specialist, employed as such by MSHA for the last seven years.

Mr. Dingess, after hearing the prior testimony of both Inspector Osborne and Mr. Ball, testified that based on the inspector's description of the affected area and the roof conditions he found there, including the fact that 60-inch resin bolts were used in this area, it was his opinion that the occurrence of a roof fall was highly likely. He went on to state that when you have sloughing out around the roof bolts, continuing bolt after bolt in a line, it weakens the roof and lets it swing on the remaining bolts on the other side. This creates an imminent danger, in his opinion, which when they are taking the pillars out, as they were here, makes it highly likely that a roof fall would occur.

To abate this condition, the area was re-supported with timbers and dangered-off and a new roadway was established.

In view of the foregoing, I conclude and find that MSHA has established a violation of section 75.200, by a preponderance of the credible evidence adduced in this case, and also find that the violation was of such a nature as could significantly and substantially contribute to the cause of a coal mine safety hazard. I accept the testimony of Messrs. Osborne and Dingess that there was a reasonable likelihood that the cited hazard could have resulted in at least serious, if not fatal, injury to a person or persons. I therefore conclude that the violation was significant and substantial and serious. Mathies Coal Company, 6 FMSHRC 1 (1984). The citation, accordingly, will be affirmed.

Related Order of Withdrawal No. 3001603, issued pursuant to section 107(a) of the Act reads as follows:

The roof on the 002-0 pillar section was loose and had sloughed out around the roof bolts as much as 12" from the plates, where the employees had cleaned up and had trammed the miner part of the way to start producing coal.

Section 107(a) of the Act provides in part as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused the imminent danger no longer exist.

Section 3(j) of the Act defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

The limited issue herein is whether such a condition or practice existed at the time this order was issued. According to Inspector Osborne, the imminent danger order was issued because of a "condition" in which he observed a miner proceed beneath an area of dangerous roof. Inspector Osborne maintained that this "condition" constituted an "imminent danger" because the inadequately supported roof might fall and kill or seriously injure the miner. I find that the hazard was such that the cited condition "could reasonably be expected to cause serious physical injury". Accordingly, I find that there was an imminent danger and will affirm Order No. 3001603.

II. Docket No. KENT 88-169

Citation No. 3166112, issued on April 5, 1988, pursuant to section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. § 75.303 and charges as follows:

An adequate preshift examination was not being made for the above mentioned mine. The seals located on the first right panel off the main intake cannot be examined because of loose roof and water. This condition has been recorded in the preshift record book and in the mine foreman's report of hazardous conditions, February 2, 1988.

The cited standard, 30 C.F.R. § 75.303, requires that operators examine seals and doors to determine whether they are functioning properly prior to each shift.

Roger Dingess issued this citation because the seals on the first right panel on the intake side had not been inspected by the operator during pre-shift examinations of this area between February 2, 1988, and the date the citation was issued, April 5, 1988. This is a period in excess of two months that these seals were not inspected allegedly due to a build-up of water and poor roof conditions extant in that area. Mr. Dingess is of the opinion that the loose roof could have been scaled down and the water could have been pumped out, which would have allowed them to examine those seals.

A request to relocate these seals was made to MSHA by the operator on February 24, 1988. But because the mine's ventilation plan expired on March 1, 1988, this request was not approved until March 28, 1988. I note here that as of April 5, 1988, when the citation was issued there was no indication that the operator was moving the seals or even preparing to move the seals. Nor was the operator examining the existent seals. Apparently, the material necessary to construct the new seals was present on the surface, but the respondent had made no effort to begin construction prior to the issuance of the citation.

The required preshift examinations of these seals were particularly important in order to detect any weakness or deterioration which might allow the seals to crush out and possibly expose the miners to black damp, which is a lack of oxygen in the air, and which very likely could have been built-up behind the old permanent ventilation seals. Furthermore, the poor roof conditions could significantly enhance the possibility of the seals crushing out in the first instance.

Mr. Dingess opined that it was "highly likely" that a fatal accident could occur involving fourteen (14) miners because of the poor roof conditions which existed in the area and the length of time for which the seals had not been examined. He also testified that in his experience there was black damp behind every seal that he has ever seen, if it had been there for awhile.

In my opinion, the record in this case concerning this citation will not support a gravity finding of "highly likely" because there is no evidence of what the actual physical condition of the seals was on the date the citation was issued.

The more appropriate finding, which I believe the record will support, is "reasonably likely".

A violation is properly designated as being of a significant and substantial nature if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury," and that the likelihood of injury must be evaluated in terms of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573-74 (July 1984); see also, Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

I find the violation is proven as charged. When Mr. Dingess discussed this situation with Harley Wilder, the Mine Superintendent, Mr. Wilder admitted that they had not been inspecting the seals. Mr. Ball also admitted at the hearing that the mine supervision got a little relaxed on the seals once they put in for the relocation. They let the water build-up in that area after that.

The second, third and fourth prongs of the test are adequately met by the unrebutted and really unopposed testimony of Mr. Dingess to the effect that the operator's failure to inspect these seals for two months left the miners in the unenviable position of not knowing the condition of the subject ventilation seals. Given the poor roof conditions in that area as well, it was reasonably likely that one or more of these seals could fail in that amount of time and release black damp which certainly could lead to serious or even fatal injuries. Accordingly, I also find that the violation was "significant and substantial" and serious.

I further find that the violation was the result of inexcusable aggravated conduct, constituting more than ordinary negligence, on the part of the operator's superintendent, Harley Wilder, which conduct is clearly imputable to the operator. The violation was therefore caused by the operator's unwarrantable failure to comply with the cited mandatory standard. Emery Mining Corp., 9 FMSHRC 1997, 2002 (December 1987); Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007, 2010 (December 1987).

Based on the foregoing, the high degree of negligence exhibited, if not reckless disregard for the consequences, and the seriousness of the violation, section 104(d)(1) Citation No. 3166112 was properly issued and will be affirmed herein.

III. Docket No. KENT 88-208

There are seven section 104(d)(1) Orders and a single section 104(d)(2) Order included in this docket. Mr. Ball, on behalf of the respondent, admits all eight of the violations that are cited in this docket, has no particular objection to those being found to be "significant and substantial" but strenuously denies the unwarrantable nature of these eight orders.

Order No. 3175428

Order No. 3175428, issued pursuant to section 104(d)(1) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 75.1722(b) and charges as follows:

The No. 2 belt conveyer head drive was not guarded to prevent persons from being caught between the belt and pulley.

Section 75.1722(b) provides that: "Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley".

Mr. Dingess issued this order on April 18, 1988, when he found that the No. 2 belt conveyor head drive was not guarded. He observed a miner greasing this belt drive unit at that time while the belt was in operation without the guard. The miner stated that the guard for this head drive had been removed for several days.

The respondent admits the violation and I further find it to be a significant and substantial violation. The head drive unit was not guarded as to prevent a miner from becoming caught

between the belt and the pulley. Furthermore, the miner stationed there must grease the belt while exposed to the moving parts, open gears and rollers. Therefore, I find it to be reasonably likely that this violation could result in a permanently disabling injury involving one miner. Mathies, supra.

I also find it to be a serious violation and caused by the unwarrantable failure of the operator to comply with the cited mandatory standard. The operator's superintendent who was in charge of performing the preshift examination in this area had actual personal knowledge the guard was missing and yet took no action to replace it. This amounts to aggravated conduct on the part of the operator because this condition was allowed to exist for several days while a miner was assigned to this duty station.

Order No. 3175428 will be affirmed.

Order No 3175429

Order No. 3175429, issued pursuant to section 104(d)(1) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 75.1722(b) and charges as follows:

A guard was not provided for the No. 1 belt conveyor tail roller.

Mr. Dingess found that a guard was also not provided for the No. 1 belt conveyor tail piece, which was located in the same general area as the missing guard cited in Order No. 3175428, supra.

The respondent admits the violation and the same rationale applies to my finding that this violation was also significant and substantial and occurred as a result of the operator's unwarrantable failure to comply with the cited standard.

Accordingly, Order No. 3175429 will be affirmed herein.

Order No. 3175430

Like the previous two orders in this docket, Order No. 3175430 was issued on April 18, 1988, pursuant to section 104(d)(1) of the Act, and alleges a violation of the regulatory standard at 30 C.F.R. § 75.1722(b), charging as follows:

The 002 Section belt conveyer head drive was not guarded to prevent persons from becoming caught between the belt and the pulley.

Herein, Mr. Dingess found that a guard was not provided for the 002 section belt conveyor head drive unit. This particular head drive unit had never been guarded, even though the belt had been in place for approximately a month.

Once again, the respondent admits the violation and my rationale for finding the violation to be significant and substantial, serious, and an "unwarrantable failure" is the same as for the previous two orders in this docket.

Accordingly, Order No. 3175430 will also be affirmed.

Order No. 3175435

Order No. 3175435, issued pursuant to section 104(d)(1) of the Act, alleges a non-"S&S" violation of the regulatory standard at 30 C.F.R. § 75.302 and charges that line brattice was not installed as required to provide adequate ventilation to the working faces.

Mr. Dingess issued this order on April 19, 1988, when he observed that a line brattice or other approved device was not being used to provide air to the face while active mining was going on in the Number 3 entry. There was no detectable movement of air in this entry.

The operator admits the violation.

The Secretary also charges that the violation was caused by an unwarrantable failure to comply with the standard in question. However, as stated earlier in this decision, in order to establish "unwarrantable failure," the Secretary must establish by a preponderance of the reliable and probative evidence that the operator has engaged in "aggravated conduct constituting more than ordinary negligence". Emery Mining Corp., supra. Rather than evidence of aggravated conduct, what this record reflects, at least as of April 19, 1988, is at best the educated guess of the inspector and at worst, speculation on the part of the inspector. I simply cannot find any hard evidence of aggravated conduct or gross negligence on the part of the operator with respect to this violation. The Secretary urges that the operator's failure to install this line brattice was a "practice" at this mine and for this reason the violation should be found to have occurred as a result of the operator's "high" negligence. However, there is no evidence of when this "practice" began, for how long it continued or who knew about it, ordered it or condoned it. Indeed, I don't find any evidence in the record that such a "practice" existed on or before April 19, 1988, although I concede it certainly may very well have. Therefore, I find that the instant order improperly concluded that the

admitted violation resulted from Sterling's unwarrantable failure to comply with the mandatory standard. Accordingly, Order No. 3175435 will be modified to a citation issued under section 104(a) of the Act, and affirmed as such.

Order Nos. 3175436, 3175438 and 2995460

These three orders, all issued pursuant to section 104(d)(1) of the Act, all allege a violation of the mandatory standard found at 30 C.F.R. § 75.301 and essentially charge that the quantity of air reaching the last open crosscut for the section mentioned therein was less than the 9000 cfm required. The operator admits all three violations.

Order No. 3175436 was issued by Mr. Dingess on April 19, 1988, when he measured the quantity of air reaching the last open crosscut on the 001 section at 7,488 cfm. Because less than 9000 cfm were reaching the last open crosscut, this was a violation of the cited standard.

The respondent admits the violation, but challenges the alleged unwarrantability. I must concur with Sterling on this one. As of this date, April 19, 1988, there was no direct evidence of aggravated conduct on the part of the operator with respect to this violation. The basis for issuing this order was Dingess suspected that they were "short-circuiting" the air, manipulating it from one section to the other, depending on where an inspector was in the mine. He also saw a curtain laying down in the return and believes that he knows what the company used it for, i.e., "short-circuiting" the air and sending it to whatever section the inspector was on. The operator, however, has several potential alternative explanations for that curtain being down and flatly denies manipulating the air from section to section.

The issue of unwarrantability concerning this particular order must be settled with the evidence that was either in existence at the time the inspector issued the order or at least that relates back to the time the order issued. He testified he issued the instant order on the basis of his suspicion that the operator was improperly regulating the air from one section to another on April 19. In my opinion, a suspicion that the operator is willfully violating a standard does not equate to evidence of aggravated conduct on the part of the operator, at the particular instant of time the order is issued, even if subsequent investigation a day, a week or a month later establishes that the operator is knowingly and willfully violating the standard at that subsequent point in time. Herein, evidence of subsequent violations of the same nature and of the same standard to prove the degree of negligence that existed on

April 19 is not of sufficient weight to establish that the instant violation was an "unwarrantable failure" to comply.

Therefore, Order No. 3175436 will be modified to a citation issued under section 104(a) of the Act and affirmed.

The other two orders, issued the next day, on April 20, 1988, by Mr. Dingess and Inspector Blume present an entirely different situation. To confirm his suspicions of the previous day, on April 20, Mr. Dingess brought another inspector with him to Sterling's No. 5 mine. They synchronized their watches and he proceeded to the 001 section while Inspector Blume went to the 002 section. At exactly high noon, they both took anemometer readings of the quantity of air reaching the last open crosscut on their respective sections. Inspector Blume measured only 1,512 cfm reaching the last open crosscut on the 002 section and so issued section 104(d)(1) Order No. 2995460 for an "S&S" violation of 30 C.F.R. § 75.301. Mr. Dingess meanwhile measured 7,704 cfm in the last open crosscut on the 001 section and issued Order No. 3175438 for a "non-S&S" violation of the same section.

This was an excellent investigative technique and makes an iron-clad case for an "unwarrantable" violation on both sections. On April 19th, the operator was put on actual notice that there was a ventilation problem at the very least on the 001 section and perhaps on both sections, one being related to the other, ventilation-wise. Furthermore, the operator abated the violative condition on the 001 section on the 19th by making adjustments that the operator knew would adversely effect the air on the 002 section. Therefore, the two ventilation violations found on the 20th were without a doubt the result of the operator's aggravated conduct and existed with the operator's actual knowledge and disregard for the mandatory standard involved.

Additionally, I find the extremely low air Inspector Blume found at the last open crosscut on the 002 section to be a significant and substantial violation of the standard as well, as his testimony concerning the reasonable likelihood of a significantly increased health hazard to the miners working there is unrefuted and credible, and I do credit it in making this finding.

Accordingly, Order Nos. 3175438 and 2995460 will be affirmed in their entirety.

Order No. 3172666

Order No. 3172666, issued on June 27, 1988, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the mandatory standard found at 30 C.F.R. § 75.303 and charges as follows:

During a discrimination complaint investigation the investigator determined through review of the preshift examination books and statements from the operator that the miners worked from April 19th to May 3, 1988, without a preshift examination being conducted of the areas worked on the second shift (maintenance shift).

Inspector Blume issued this order because the operator had failed to have a certified person perform a preshift examination of the mine prior to the second shift between April 19 and May 3 of 1988. The second shift was a maintenance shift employing three miners and a foreman. Before April 19, one Danny Elliot was the second shift foreman and the person certified to perform the preshift examination. He was fired on April 19, 1988, and not replaced until May 3, 1988. In the meantime, no preshift examination was performed prior to the start of the second shift.

The operator contends the preshift examinations were being done, but just not recorded. I specifically reject that contention as incredible. As far as I am concerned, the preshift examination book for the mine for the period between April 19, 1988 and May 3, 1988, establishes by a preponderance of the credible evidence available that preshift examinations were not being performed for the second shift during that entire time period.

There is additional evidence to that effect. Mr. Ronnie Brock, a special investigator for MSHA, had occasion to investigate this allegation concerning preshift examinations as part of a discrimination complaint investigation involving two discharged miners at Sterling's No. 5 Mine. It was reported to him by the other two miners who continued to work the second

examination book itself and I do give it weight, particularly on the issue of "unwarrantability".

I also recognize that the Commission recently rejected the notion that any violation of section 75.303 is per se significant and substantial in nature. Birchfield Mining Co., 11 FMSHRC 31, 35 (January 1989). The Mathies test is still the proper test to apply in making the "S&S" finding and applying it here, I find that the respondent's failure to preshift this mine on the second shift for some two weeks running is a significant and substantial violation of the mandatory standard. There is a violation of the mandatory standard established, if not admitted. There is also a discrete safety hazard presented in my opinion in that two miners worked the second shift for some two weeks without a foreman present and without a preshift examination being conducted approximately a mile underground while a myriad of other violations and hazards existed, as demonstrated earlier in this decision. At least some of the other violations that existed at that time were themselves significant and substantial and some violations, particularly ventilation-related ones were repetitive in nature as well. I believe the mining conditions and lack of supervision were such during this period of time that the failure to inspect and report any violative or hazardous conditions prior to these two men going into the mine constituted an "S&S" violation of the preshift standard because in my opinion there was a reasonable likelihood that the hazard contributed to would have resulted in an event in which there very well could have been a serious injury.

Order No. 3172666 will be affirmed in its entirety.

Civil Penalty Assessments

A computer printout entered into evidence as Petitioner's Exhibit No. 16, indicates to me that this operator has a relatively lengthy history of roof control and ventilation violations in the two year period prior to April 17, 1989. This is not a good sign, to say the least.

There is some question raised as to the operator's financial ability to pay these assessments and remain in business. At the hearing the respondent put into evidence a document that purports to be a financial statement. However, this statement is unaudited and the CPA firm that submitted it attached a very big disclaimer to it that renders it all but worthless for its intended use, i.e., to prove the respondent's inability to pay. Mr. Ball also testified that the No. 5 Mine is now closed, but the No. 8 Mine was opened in latter 1988. The record really does not contain any substantial evidence in a usable form concerning the operator's financial condition. Therefore, I find that the

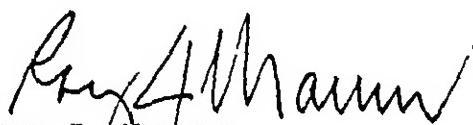
civil penalties ordered herein, infra, are appropriate considering the size of the operator and such penalties will not cause the company to discontinue in business.

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of civil penalties is warranted as follows:

<u>Citation/Order No.</u>	<u>Date</u>	<u>Standard</u>	<u>Penalty</u>
3001604	9/11/87	75.200	\$ 1100
3166112	4/5/88	75.303	1200
3175428	4/18/88	75.1722(b)	500
3175429	4/18/88	75.1722(b)	500
3175430	4/18/88	75.1722(b)	500
3175435	4/19/88	75.302	200
3175436	4/19/88	75.301	200
3175438	4/20/88	75.301	400
2995460	4/20/88	75.301	500
3172666	6/27/88	75.303	750

ORDER

1. Citation Nos. 3001604 and 3166112 ARE AFFIRMED.
2. Order Nos. 3001603, 3175428, 3175429, 3175430, 3175438, 2995460, and 3172666 ARE AFFIRMED.
3. Order Nos. 3175435 and 3175436 ARE HEREBY MODIFIED to citations issued under section 104(a) of the Act, AND AFFIRMED.
4. Respondent, Sterling Energy, Inc., IS ORDERED TO PAY civil penalties totaling \$5850 within 30 days of the date of this decision.



Roy J. Maurer
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., William F. Taylor, Esq., U.S. Department of Labor, Office of the Solicitor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Ralph Ball, President, Sterling Energy, Inc., P.O. Box 1528, LaFollette, TN (Certified Mail)

/ml

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 12 1989

UTAH POWER & LIGHT COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 89-160-R
: Citation No. 2876485; 3/16/89
SECRETARY OF LABOR, : Cottonwood Mine
MINE SAFETY AND HEALTH : Mine ID 42-01944
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Timothy M. Biddle, Esq., Susan E. Chetlin, Esq.
Crowell & Moring, Washington, D.C.,
for Contestant;
Robert Cohen, Esq., Office of the Solicitor
U.S. Department of Labor, Arlington, Virginia,
for Respondent.

Before: Judge Morris

This case is before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), to challenge the issuance by the Secretary of Labor of a citation charging Utah Power & Light Company ("UP&L"), with a violation of the regulatory standard published at 30 C.F.R. § 75.1105.

After notice to the parties a hearing on the merits was held in Denver, Colorado on April 5, 1989. The parties relied on oral arguments, waived the filing of post-trial briefs and further requested a decision without receiving the transcript of the proceedings.

Summary of the Case

Citation No. 2876485, issued on March 16, 1989, charged contestant with violating 30 C.F.R. § 75.1105, which provides as follows:

§ 75.1105 Housing of underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps.

[Statutory Provisions]

Underground transformer stations, battery-charging stations, substations, compressor stations, shops, and permanent pumps shall be housed in fireproof structures or areas. Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return. Other underground structures installed in a coal mine as the Secretary may prescribe shall be of fire-proof construction.

Citation No. 2876485 alleges the following violative condition:

The transformer being used to supply 480VAC to the 12th West belt drive located at crosscut #2 12th West was not being vented directly to the return.

When tested with chemical smoke, the smoke was observed entering the intake entry for the 12th West working section through holes in the stopping being used to isolate the transformer. A power cable was observed exiting through one of the holes. This hole measured 3½ inches wide x 8 inches high.

When tested in front of (outby end), over, at the sides of the transformer, smoke was observed moving toward the intake stopping that was located 18 feet 4 inches (measured) away from the transformer.

A 12 inch vent tube was located on the left rib inby the transformer. The vent tube was 28 inches (measured) from the left corner of the transformer and back 3 feet from the end of the transformer and ran 150 feet to the return. There were no check curtains across the cross cut to enclose the transformer. The cross cut was open to the belt drive.

- 1) The transformer had been at this location since Aug. 1988.
- 2) Approximately 2 weeks ago, a major air change was done to increase the amount of air to the newly installed longwall section.
- 3) The hole was made in the stopping 1 or 2 days earlier to supply power via the cable.
- 4) Management was aware the air change and should have re-evaluated this transformer for proper ventilation.

The above 4 items are contributing factors concerning this condition.

Issues

The issues are whether a violation of 30 C.F.R. § 75.1105 occurred; if it occurred, should the violation be designated as S & S and if a violation occurred was it due to the unwarrantable failure of the operator to comply with the regulation.

Stipulation

At the commencement of the hearing the parties stipulated as follows:

1. The Commission and the Administrative Law Judge hearing the dispute have jurisdiction to determine this case.
2. Donald E. Gibson, an MSHA Inspector, was an authorized representative of the Secretary at the time of the inspection.
3. The Cottonwood Mine is a large coal mine.
4. Various exhibits can be admitted into evidence without further authentication. These include Exhibits C-1, C-2, C-3, as well as R-1 and R-2.

Secretary's Evidence

Donald E. Gibson is a federal coal mine inspector. He is also an electrical specialist and he has been employed by MSHA since May 26, 1987. The witness has extensive background experience in mining as well as in his specialty. He is assigned to the Orangeville, Utah office.

He is familiar with the Cottonwood Mine and on March 14, 1989, he began an electrical inspection at the mine. During his pre-inspection conference with management, he advised the operator why they were inspecting the mine. At that time he also reviewed with management previous Triple-A inspections. Those in attendance at the conference included maintenance and safety representatives as well as the superintendent, mine foreman and the miner representative. At the meeting they also discussed the national sales policy manual, that is, the inspector's manual which states the intent of certain laws and regulations relating to safety and health.

At this meeting it was indicated that certain District 9 policy had been rescinded.

On December 30 there was another inspection at the mine and Inspector Gibson indicated to the company they would have to vent transformers directly to the return. This was discussed with representatives of the safety department including Tatton, Norton and a miner representative. In the witness' opinion "directly to the return" means the venting shall be without any deviation. The Bureau of Mines recommends a 3,000 cfm flow of air over transformers.

The company can use tubing to vent its transformers to the return. If the area is vented without being enclosed it would not be vented directly to the return.

After the pre-inspection on March 14 he started this inspection and it continued on March 16, 1989. On that date Inspector Gibson went underground at approximately 8:05 a.m. to 8:15 a.m. He was accompanied by the superintendent of maintenance, safety department representatives, and a miner representative.

During the course of the inspection they went to the 12 West Belt Area where he intended to observe the longwall where miners

were working. After leaving the longwall face they were on their way outside. While traveling in a vehicle the inspector noticed a power center in an open crosscut.

The power center was in crosscut 6. (Crosscut 6 was marked on Exhibit R-1.) The equipment in the XC was a 480 VAC rectifier. The rectifier was neither housed nor plugged. He then followed the electrical cable of the rectifier 400 feet to a stopping in the main intake airway, which was also a primary escapeway. At crosscut 2 the inspector observed that the cable went through a hole in the stopping. Beyond the stopping was an energized transformer. A person could pass through the stopping by using a 5-foot high by 6-foot wide steel door. (See Exhibit C-2 showing equipment in CX2.)

Also located in crosscut 2 were electrical belt starters and belt drive electric motors. The belt entry also serves as a secondary escapeway. ^{1/}

Inspector Gibson believed the transformer was not being vented directly to the return. To verify this he took 9 different smoke samples at various places close to the transformer. (Marked as red X on Exhibit C-2.)

The long and short of his 9 samples were that the smoke was not moving directly to the return. Some of the smoke hung in place and in the last 3 tests (closest to the stopping) the smoke moved through the 3 $\frac{1}{2}$ " x 8" hole in the stopping.

It is permissible to knock a hole in the stopping but it must be resealed.

The inspector opened the door in the stopping and saw smoke in the air intake. He also repeated these tests for his supervisors who were present. In addition, the company representative agreed they saw smoke in the air intake.

He then told company representative Peacock that the company had a (d)(2) order. He issued such an order because 15 miners inby were subjected to the hazard of a fire occurring at the transformer. The belt air was not isolated and there was no isolation because of the hole in the stopping. In addition, the secondary escapeway was not separated from the primary escapeway. (The witness marked the intake air course with red arrows on Exhibit C-2.)

^{1/} The inspector later conceded that the belt entry shown in Exhibit C-2 was not an escapeway.

In addition there was a CO center inby the transformer. If the inby crews came out the secondary return escapeway, that area would already be contaminated by any smoke.

The vent pipe would also pick up the smoke if there was a fire in the transformer area.

After Inspector Gibson orally issued his (d)(2) order, company representatives claimed the company was no longer subject to the (d) series. Inspector Gibson believed otherwise but he checked with William Ponceroff, his supervisor. Mr. Ponceroff confirmed that Inspector Jones had just completed an inspection and, in fact, the company was off the (d) series.

For this reason Inspector Gibson issued a (d)(1) citation.

A company representative indicated that the hole in the stopping had been made by a diamond drilling crew in the last day or two. But the hole was not more than three days old. The inspector did not recall the name of the person he was given but he didn't feel he was being too harsh on the operator in issuing the (d)(2) order. He felt the company met the unwarrantability feature. In fact, the inspector previously had three conversations with management about venting directly into the return.

To be in compliance, the company would have had to erect a fire wall check curtain to enclose the transformer and the air would have to be channeled into the vent tube. Without the installation of a stopping, the smoke could go into the belt entry. (See Exhibit C-2 to locate belt entry.)

When the inspector saw smoke enter the intake entry, he concluded there was a violation of § 75.1105.

He then told company representative Tatton that if the Jones' inspection was completed, the company could put up a check curtain inby the transformer and plug up the hole in the stopping with cinder block and plaster.

Additional smoke tests by Inspector Gibson showed the smoke merely hanging in the area of the transformer; it was not being drawn into the vent tubing.

Abatement was accomplished by a combination of steps. Initially, a check curtain was hung (and rehung) outby the transformer. (See blue dots on C-2 for location of curtain.) Further, the 12-inch metal corrugated vent pipe was extended 10 feet toward the transformer and an additional 5 feet to the side. (See green lines on Exhibit C-2 showing route of vent piping from the transformer some 135 to 140 feet to the return air in 3rd South entry.)

It took an hour and fifteen minutes to abate the violation. Abatement was confirmed when smoke flowed directly into the tube.

Prior to abatement the transformer had not been vented directly to the return.

Crosscut 2, where the transformer was located, is a work area that must be pre-shifted and the hole in the stopping was obvious. Someone told the drilling crew to do this work and there had been three weekly examinations and two or three electrical examinations of the area. Some person must have observed these conditions.

The inspector observed a beltman in the belt entry downwind from the belt drive. Any smoke would come down to him. The safety and health of the beltman and the 15 miners in the longwall would be affected by the hazard.

Any fire in the transformer or belt drive would generate thick heavy smoke from the neoprene, rubber and transformer insulation cables. Such smoke could take away your breath. A W-65 self-rescuer would not filter such smoke. It would only take a small amount of it to overcome a miner.

Exhibit C-2 shows various fire-suppression devices in the crosscut. The installed heat sensors would detect any heat; however, there are times when the solenoids will stick.

The inspector wrote a three-page citation describing the conditions he observed. He also wrote four items which contributed to the citation.

These items, as testified by Inspector Gibson and as listed on the citation, were as follows:

1. The company indicated that the transformer had been at this location since August 1988.
2. Although he was told that there had been a major air change two weeks ago, such a change should have caused the air to draw better.

The witness is aware of the definition of unwarrantable failure. Basically, unwarrantable failure means aggravated conduct by the operator, that the operator knew and was aware of the concerns. He had talked to the operator repeatedly and if after such discussions the company goes in the direction of non-compliance then such conduct constitutes aggravated negligence.

The company had experienced a major mine fire. The company has 24 belt drives and probably a transformer for each belt drive.

None of the areas were enclosed before the citation was issued and the inspector had only looked at two other belt drives.

The inspector considered the violation to be serious because the primary and secondary escapeway could be contaminated with smoke. The 15 miners at the longwall and the beltman would be affected.

The inspector concluded that the conditions here involved unwarrantable failure on the part of the company for several reasons. Initially, the drill foreman had been told to knock a hole in the stopping. The area was pre-shifted and in fact some 18 to 27 pre-shifts had been done as well as 6 to 9 on-shift checks. But no one reported the hole in the stopping. In addition, Section 75.512 requires weekly examinations of electrical equipment and this should have been discovered.

In addition, the inspector personally discussed venting the transformer with upper management and they had 2 or 3 days to re-evaluate their position after he was on the company's property. In addition, he was astounded when he saw the ventilation tubing and he concluded that the company could not reasonably think that it could ventilate the transformer in this fashion.

Further, all pre-shifters have smoke tubes. In addition, the four items he listed on the citation indicated to him that the operator was indifferent and did not seal or enclose the transformer area so the ventilation pipe could accomplish its desired result.

The inspector believed it was an S & S violation for a number of reasons:

1. Section 75.1105 was violated.
2. A strong safety hazard was involved as miners could be overcome by smoke.

3. It was likely that an injury could result and it would be serious; being overcome by smoke could result in disability or a fatality.

Concerning gravity, the inspector concluded it was reasonably likely that an injury could result from the violative condition. It would be possible to have smoke in the entry without being detected by a monitor. This occurred in a previous 26-minute fire where the surface did not receive a signal from the monitors.

On cross-examination the inspector admitted that the transformer was enclosed in a metal container and so there was no violation in the first sentence of the regulation. He believed the second sentence had been violated. 2/

The revoked District 9 policy in essence stated that an operator was in compliance if it vented a transformer into a return entry "eventually". The District 9 policy which was revoked did not address transformers as such.

On December 20, the Manager of District 9 rescinded previous District 9 policy and a memorandum to this effect went to the inspection force. Inspector Gibson did not give the company anything in writing nor did they ask for it. (Exhibit C-4 revokes prior policy.)

On December 30, he discussed the new policy with UP&L and told the company they would have to ventilate directly into the return, use an air lock, 3/ further, all enforcement would be guided by Part 75. The reason for ventilating is to keep the heat down on the equipment by keeping the transformer cool.

The inspector was aware that § 75.1105 is part of a series of fire regulations and is not a ventilation regulation.

2/ The second sentence of the cited regulation reads:

Air currents used to ventilate structures or areas enclosing electrical installations shall be coursed directly into the return.

3/ Air locks are not involved in this case.

The rectifier in crosscut 6 was not energized nor housed, nor was it vented directly to the return.

Walking down the intake air, the flow of it was in the inspector's face at about 62,000 - 63,000 cfm.

The CO sensor was a block away from the transformer. The sensor will activate at 15 parts per million. He did not test the sensor and he supposed it was operable.

He was tracing cable that went to the crosscut 2 area. The hole in the stopping was at the upper left side. The stopping was 18 to 20 feet wide, the hole in it was 3½" x 8". It is not unusual for cable to go through a stopping. The rectifier cable is 1½ inches in diameter and it took up that much of the 3½" x 8" hole in the stopping. Sufficient room remained for a person to reach his hand through the opening.

There were other problems and other potential violations in the area but the inspector did not issue citations from these other conditions because he wanted to be fair with the operator. It seemed to him that issuing additional citations would be unfair.

It was 18 feet from the transformer to the stopping. The transformer was in a metal box and it was free standing.

The mine roof was above the transformer. It rested on gravel. The vent was corrugated metal and located by the left corner. It was two feet back from the transformer and located to the side.

The cable from the rectifier was connected to the transformer.

He was not sure if the belt entry at this location was a secondary escapeway. The witness agrees that the belt entry was not a secondary escapeway because the secondary escapeway makes a bend and it goes into the main return before it reaches this area.

The inspector knew the vent tube was not venting as a result of smoke tests. Vent tubing attempts to ventilate an area and to go into the main return.

The transformer must be close to the belt drive and the company attempted to comply with the regulation by putting in ventilation tubing.

A transformer fire could affect workers. The belt was not isolated and the secondary escapeway was not separated from the primary but this is based on the inspector's misapprehension that this area was a secondary escapeway. The power pack is also protected by sprinklers. It is the Secretary's scenario that there could be a failure of the water system or the CO system or that the belt attendant would not react to a fire. In his scenario some things could go wrong.

A two-man diamond driller team made a hole in the stopping as the inspector was told by company representative Tatton.

Inspector Gibson did not talk to the diamond drillers. He also asked the company but they could not identify the drillers.

Inspector Gibson discussed venting directly into the return with the company officials. He thought they were ignoring his earlier warning but he didn't think the vent tube could vent the transformer directly into the return. They said the tube had been there for a month. It would be reasonable for the company to check to see how the tube was drawing. The hole in the stopping served to accommodate the cable and was not for ventilation purposes.

The witness issued the citation because the air was not being pushed over the transformer. The violation existed before the hole was put in the stopping. In sum, the hole in the stopping only contributed to the violation.

The violation would still have been a unwarrantable failure even if there had been no hole in the stopping.

On December 20, 1988, venting directly to the return became a requirement by virtue of a national MSHA directive.

The inspector assumed that the major air change undertaken by the operator was an increase of 40,000 cfm. Such an increase would permit the air to draw better.

Concerning unwarrantability, the inspector was told that the foreman received a directive to put the 3 $\frac{1}{2}$ " x 8" hole in the stopping. The hole was a catalyst and a contributing factor in the unwarrantable failure designation.

The inspector was "astounded" when he saw an open area where the transformer was located was not enclosed as by a check curtain or omega wall.

In his citation the inspector stated that 15 miners could be impacted by a transformer fire but this does not include the belt attendant. He did not know if the beltman was always in the area of the transformer. However, the beltman would be one to recognize the smoke conditions.

When the inspector advised the operator of the change in policy, he recognized that UP&L needed time to comply, and he personally afforded them such an opportunity. They could comply in 15 to 30 days. They could comply by evaluating the transformer and they might relocate it, and they could re-evaluate the system. The company should have re-evaluated its transformer.

Section 75.1105 has never been changed nor has there been a change since the 1969 Coal Act regarding venting directly into the return.

The 3 $\frac{1}{2}$ " x 8" hole in the stopping was obvious.

Sufficient smoke could get through the 3 $\frac{1}{2}$ " x 8" hole to contaminate the adjoining airway.

The inspector took no air readings as he did not think it was necessary. He didn't see any company personnel taking air readings and the air was going directly to the return.

If the inspector had found fire suppressor devices in that area not functioning he would have issued a \$ 107 imminent danger order.

He has recently seen a movie where all fire suppression devices failed during a mine fire.

Fifteen to thirty days is a reasonable time to comply. The vent tube had been there for one month before March 16, 1989.

The smoke through the 3 $\frac{1}{2}$ " x 8" inch hole went into the intake. There was 60,000 cfm in the intake.

In the event of a raging fire the stopping would quickly burn.

JEFFREY A. RACHETTI is a miner mechanic at the Cottonwood mine as the Safety and Health Representative for the UMWA.

He accompanied Inspector Gibson on walk-arounds and he was with him when this citation was issued.

Mr. Rachetti agrees the (d)(1) order stated a violation of the regulation. He also agrees that it was a unwarrantable failure violation because every day people travel that area and they should have noticed it in their travels.

Mr. Rachetti was with Inspector Gibson during the smoke tube test and he believed Gibson's testing was adequate.

Concerning seriousness, he observed a real hazard in the smoke leaving the area via the hole in the stopping and going into the airway.

There was a possibility of a fire and the company has had a few fires. One of them killed 27 people, and this could happen again.

The witness was familiar with the CO monitoring intakes and there was no problem with the monitoring systems within a week of the order. However, during that previous week there had been electrical problems. The operator has a back-up electrical system.

There is a beltman assigned to the 12 West Belt Drive. He walks to the tailpiece, which would be 150 to 200 feet from the working face. The area where the transformer is located would be 2,000 to 3,000 feet away from the face.

In the witness' opinion Gibson is a very consistent inspector, that is, he does his job and explains things to the miner representatives. Mr. Rachetti has a high opinion of Mr. Gibson's skill.

The witness travels with other federal inspectors. Section 75.1105 is a violation and the transformer was not properly vented.

The tube was not over the transformer and it would not draw smoke. The company should have noticed the hole.

The vent tubing was in place 30 days before the citation and he learned this from someone in the safety department.

The CO system is activated at 30 PPM (parts per million).

The vent was physically in view when he was in the area with Inspector Gibson.

UP&L's Evidence

GLENN JOHNSON has been UP&L's general belt supervisor for a year; prior thereto he was the belt maintenance foreman. Previously he was a coal miner and also a hard rock miner.

He works the day shift supervising maintenance and all conveyor belt lines in the mine.

The witness is familiar with the 12 West Section.
(Witness shows the 12 West Belt Drive on Exhibit C-1)

A belt drive is a mechanism that moves the belt and transports coal.

In 12 West there is one belt drive which is 3200 feet long.

Coal is dumped at crosscut 32, the headgate of the longwall. From that point it is transported by belt to the outside.

Electricity comes to the belt via a high voltage cable through a transformer to a starter box in a belt drive. There is a step-down unit for the transformer and the electricity is stepped down to 480 volts. The starter box itself is 15 feet from the transformer. (The witness marks starter box as "SB" on Exhibit C-2.)

SB is metally enclosed; 6 foot long, 3 foot high and sits on legs.

The witness also identified the power pack (PP) which is a metal tank 3 foot square. This is all in the No. 2 crosscut in 12 West Section. The height of the area is 9 feet.

The block stopping in crosscut 2 consists of 1 inch by 16 inch cinder blocks. The company mortars the joints on the cinder blocks.

The stopping contains a 6 foot by 5 foot steel door and the stopping is coated on the intake side to retard air movement.

The beltman inspects and maintains the area.

Water sprinklers are installed over the belt drive and over the power pack.

A fire hydrant is located at the side of the drive and heat and sensors are connected to the fire detection systems located at 50 foot intervals. There is also 500 feet of hose stored within 50 feet of the fire hydrant.

A foam adductor mechanism attaches to the end of the fire hose and this creates suction which introduces foam into the water. The foam is a fire-fighting device that removes oxygen from the atmosphere.

On March 16, the foamer was 15 feet from the south end of the transformer.

In addition, there were 40 to 50 pound sacks of rock dust on the east side of the transformer and within 10 feet of it on the intake side of No. 2 stopping. This was approximately 250 pounds of rock dust, which covers coal on the floor and is used for fire fighting purposes.

There are 3 No. 10 fire extinguishers in the area. Two are on the south side of the transformer and one is adjacent to the starter box.

There are also 3 SCSRs in the adjacent area, one CO sensor in the belt entry and one in the adjacent entry.

The equipment the witness described was in place on March 16 and witness Johnson is in the 12 West Belt area four times a shift.

Seventy-five percent of the operator's coal comes from this section.

On March 16 he saw Inspector Gibson at 10:00 a.m. when he walked into the area. Inspector Gibson was looking at the equipment and he observed him use a smoke tube.

Inspector Gibson proceeded to inspect the stopping. He was looking at the cables that went through the stopping.

The inspector told the company representative Peacock that there was a problem with a hole in the stopping and he then proceeded to test with smoke between the transformer and the stopping.

The smoke tube is a chemical and when it is released into the air it produces smoke. The purpose is to detect air flow. Johnson observed three tests at the transformer and two tests at the stopping.

On one of the tests he could see no smoke movement. The equipment entering the 3½" x 8" hole in the stopping was 1-inch cable and a smaller telephone cable.

The third smoke test that Johnson observed was in the transformer area and the fourth test was in the center of the transformer and then at the north end of the transformer.

The witness saw most of the smoke go into the vent tube. The vent tube had been there for about a month and that was the only airflow through the entry.

The belt attendant checks the transformer and he is required to check with the power center of the transformer. He keeps a record of this check. He physically goes into the area.

The beltman marks his cards to show checks made on one hour intervals.

On the 16th Witness Johnson did not make any notes.

He had seen the citation issued by Inspector Gibson concerning conditions and practices.

He agrees some smoke went through the hole in the stopping and ventilation was going through the tube when he put his hand up to it. It is possible that all the air was not going into the tube.

The witness saw no smoke from the test on the transformer and didn't know if there was a violation.

Part of the smoke hung suspended on the north side but most of it went into the tube. On the test on the south side of the transformer the smoke simply hung there. He saw smoke from two tests going toward the tube.

He did not attempt to show Inspector Gibson if the fire suppressant equipment was working in the area.

Mr. Johnson did not know who made the hole in the stopping and did not know the name of the foreman. The holes were not sealed and it appeared that the workers had knocked out an entire cinder block.

No protection was provided for the trailing cables or through the stopping and he did not know if the cable was ever energized.

Mr. Johnson concedes he is not an expert in ventilation nor in ventilating transformers. However, he was satisfied that the tube was ventilating the transformer.

The stopping hole should have been observed by mine management and the hole existed for one or two days. The hole put there was to get the cable to the power supply.

Mr. Johnson was involved in abating the citation. They plugged the hole and hung curtain on the north end of the transformer. Gibson rechecked and it was still inadequate. The tube was changed in length and direction.

During the test the inspector said the effort was still inadequate; they were not getting airflow at the south end of the transformer.

The witness agreed that you could see smoke drifting into the belt entry.

Gibson asked Peacock and another individual to go to the intake side of the stopping. In this test, within 16 feet of the stopping, smoke went through the hole in the stopping.

The airflow would go over the belt drive and course to No. 4 crosscut and vent directly into the return. (On R-1 the witness marked directional flow of the smoke with red arrows.)

Smoke will activate the CO monitors.

Discussion

The initial issue to be considered is whether or not the violation of Section 75.1105 occurred.

On this issue the credibility determination must be made between the testimony of Inspector Gibson and UP&L's witness Johnson.

I credit the testimony of the inspector for several reasons. The inspector is clearly a knowledgeable expert compilation. In comparison, Witness Johnson readily admits he was not a ventilation expert. I further credit his testimony because it was forthright and positive with Mr. Johnson's testimony which at times hedged as to whether or not the vent pipe was in fact ventilating the

On Inspector Gibson's testimony it is clear that the transformer was not in fact vented directly into the return and a violation of the regulation occurred.

A further issue presented is whether the occurrence should be designated as significant and substantial within the meaning of the Act.

Section 75.1105 embodies the statutory provisions and it was originally enacted by the Federal Coal Mine Health and Safety Act of 1969. It has essentially remained intact until this time.

The Secretary, relying on the legislative history of the 1969 Coal Act, argues that any violations of § 75.1105 are per se significant and substantial. The legislative history of the 1969 Act ^{4/} expresses the Congressional view as follows:

Section 212(c)

This section provides for certain underground equipment that could cause fires if not functioning properly to be placed in fireproof structures. Air that is used to ventilate the structure and which might contain noxious fumes must be passed directly to the return air.

Experience has shown that such a requirement will reduce the possible mine fire hazards with accompanying inherent dangers to human life and property. In the event a fire should occur in one of these installations the type of equipment enclosed is of such a nature that considerable smoke and fumes are emitted and therefore should be coursing directly into the return air-course before endangering human life.

^{4/} Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 204 (1975) ("Legis. Hist.")

In Birchfield Mining Company, 11 FMSHRC 31 (1989) the Commission rejected a per se argument as it related to the violation of a different regulation. I likewise reject the per se argument. However, the credible evidence as recited in the summary of the evidence establishes the violation was S & S as outlined by Commission doctrine expressed in Mathies Coal Company, 6 FMSHRC 1 (1984) and U.S. Steel Mining Co., 6 FMSHRC 1573-74 (1984).

For the foregoing reasons the circumstances here constitute an S & S violation of the regulation as contained in Section 104(d)(1), 30 U.S.C. § 814(d)(1) of the Act.

The final issue concerned is whether the circumstances involved here are due to the unwarrantable failure of the operator to comply with the regulation.

The Commission has clearly delineated its views of the meaning of unwarrantable failure. It means "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." Emery Mining Corporation, 9 FMSHRC 1997-2004 (1987). See also, Quinland Coals, Inc., 10 FMSHRC 705 (1988), and Helen Mining Company, 10 FMSHRC 1672 (1988).

It is uncontested in this case that the policy in MSHA District 9 for many years was to the effect that transformers did not have to be ventilated directly to a return air course. On December 30, 1988, there was a meeting where the company was advised that previous District 9 policy had been rescinded. Thereafter, the company would have to vent transformers and similar installations directly to the return. It is further uncontested in the record that the company did, in fact, install a 12" corrugated metal vent pipe, one end of which was in close proximity to the end of the transformer. It extended from that point toward the belt drive entry, a distance of 25 feet, and then extended down the belt entry to the 3rd South air return, a distance of approximately 90 feet (See directions and scale in Exhibit C-2). The record is further uncontested that the installation was completed by the operator about 30 days before this citation was issued; namely, about mid-February 1989. Such an installation contradicts any view that the operator's actions constituted "aggravated conduct". To the writer it establishes that there was an attempt to comply with the regulation on the basis of the advice the operator had received from the inspector on December 30, 1988.

For the foregoing reasons I conclude that the operator's conduct was not aggravated within the meaning of the Emery Mining Company, et al case precedent.

I would rule differently if I concluded the metal corrugated vent tubing was merely a charade to comply with the regulation, but I find it was not. The inspector testified he was "astounded" to observe this venting. Further, he could not believe that the company would think that this would ventilate the transformer. I concede the inspector may well have been astounded because what he saw conflicted with his expertise. However, the uncontroverted facts again are that when abatement was accomplished the transformer was vented by using the tubing. The tubing itself was extended about 10 feet toward the end of the transformer and about 5 feet to the side, and a curtain was hung to enclose the area in the crosscut. I accordingly conclude that the operator did not ignore the inspector's advice, nor did they ignore the new MSHA policy, but they acted in a responsible manner. The fact that its effort did not accomplish the desired result cannot work to its detriment. In sum, the operator's conduct was not aggravated within the meaning of the Commission decisions and the factual circumstances cannot be described as a result of the company's unwarrantable failure to comply. The designation of unwarrantable failure in the citation should be stricken.

Consolidation Coal Company, 9 FMSHRC 782 (1987) (Melick, J.), relied on by the Secretary, is not inapposite the views expressed here. In Consolidation the operator did nothing and, in fact, relied on the previous interpretation that no violation occurred so long as the power center was "eventually" ventilated to the return. 9 FMSHRC at 785. But this was the prior policy that had been revoked in December, 1988.

Summary

To summarize the action to be taken: I conclude the 104(d)(1) Citation No. 2876485 should be affirmed under Section 104(a) of the Act and not under Section 104(d)(1) of the Act.

For the reasons previously stated the citation should be designated as significant and substantial; further, the designation of unwarrantable failure should be stricken.

For the foregoing reasons I enter the following:

ORDER

1. Citation No. 2876485 is affirmed as a violation under Section 104(a) of the Act.

The allegations that contestant violated section 104(d) of the Act are stricken.

2. The allegations that the violation of the citation are significant and substantial are affirmed.

3. The allegations that the contestant's unwarrantably failed to comply with the regulation are stricken.



John J. Morris
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., Susan E. Chetlin, Esq., Crowell & Moring, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004 (Certified Mail)

Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 12 1989

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 88-202-D
ON BEHALF OF	:	MORG CD 87-22
WILLIAM J. KELLER	:	
Petitioner	:	Ireland Mine
v.	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor,
U.S. Department of Labor, Philadelphia, PA,
for Complainant;
Michael R. Peelish, Esq., Pittsburgh, PA, for
Respondent

Before: Judge Fauver

This proceeding was brought by § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The Secretary violated § 105(c)(1) by reprimanding William J. Keller for engaging in protected company policy requiring employees to report first to a foreman or mine manager before reporting to a government inspector or a mine manager. The Secretary seeks injunctive relief and a civil penalty.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the discussion that follows.

FINDINGS OF FACT

1. On July 3, 1987, William J. Keller was working as a precision mason in the Three North Section of Respondent's Ireland Mine. The mine produces coal for sale or use in or affecting interstate commerce.

2. Keller and Harry Gallagher were building an overcast, a job that required about eight bags of block bond. Only one bag of block bond was at the construction site.

3. Following a common practice at the mine, after they applied the bag of block bond they searched for block bond in other parts of the mine. Keller looked in the belt entry and Gallagher searched the supply track. Both miners considered the places in which they were searching to be part of their work area for the purposes of the construction job.

4. The two miners had previously searched areas of the mine to look for work materials, without asking permission of a foreman and without being reprimanded for such practice. Local union president Jerald Stephens could not recall any case in which a miner was disciplined (before the instant case) for leaving his work area to search for materials. Witnesses Keller, Gallagher, Stephens, and Wise testified that it was a common practice for miners to look for work materials in the mine. Keller's foreman had instructed him on previous occasions that if he needed supplies, he should look for them. Gallagher had never been instructed that he should first contact a foreman before looking for supplies.

5. While looking for block bond, Keller came upon an inspection party in the belt entry: state mine inspector Colin Simmons, company mine safety representative Chris Alloway, and union safety committeeman Billy Wise. Inspector Simmons cautioned Keller by telling him that he (Keller) had just walked under an unguarded trolley wire. After walking a bit farther, Keller stopped, turned, and told Billy Wise that there was tight clearance and an unguarded high line in the supply track. This statement was audible to Inspector Simmons as well as to Wise and others present. It was, in effect, a complaint of two alleged safety violations or dangers.

6. The inspection party went to the supply track area mentioned by Keller, and there Inspector Simmons issued two state citations for the conditions Keller had mentioned. After the issuance of the citations, the company mine safety representative, Alloway, asked Wise, "Does Mr. Keller always cause trouble like this?" (Tr. 77.)

7. After Keller finished his shift (on Friday, July 3, 1987), the shift foreman met him outside and told him that the mine superintendent, John Snyder, wanted to see him the following Monday.

8. Over the weekend, Keller told the local union president, Stephens, that Snyder wanted to see him on Monday. Stephens said he would accompany Keller to the meeting with Snyder.

9. That Monday, at a meeting in Snyder's office, Snyder reprimanded Keller for reporting safety violations to a state inspector and a safety committee member, and threatened him with discharge if he reported safety complaints to a federal or state mine inspector or to a union safety committeeman in the future. Keller testified that Snyder stated, "I cost him a lot of money on July 3rd by turning in those violations and he told me if I ever talked to a safety committeeman or a state or federal mine safety inspector that he would discharge me." (Tr. 12.) Stephens confirmed that Snyder reprimanded and threatened Keller, and that the threat was serious. (Tr. 136, 139.) I credit Keller's and Stephens' testimony on this matter.

10. Harry Gallaher was not reprimanded or threatened for walking up the supply track to look for block bond.

11. Respondent has a policy that mine employees must first report safety hazards or violations to a supervisor or mine management before they report them to a government inspector or safety committee member.

DISCUSSION WITH FURTHER FINDINGS

In order to establish a prima facie case of discrimination under § 105(c) of the Act, a miner must prove that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. In order to rebut a prima facie case, an operator must show that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity alone and would have taken the adverse action in any event for the unprotected activity. Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC 803 (1981).

Keller was engaged in a protected activity when he reported alleged safety hazards or violations to his safety committeeman, Billy D. Wise, in the presence of a state mine inspector, on July 3, 1987.

Respondent has demonstrated a hostile attitude towards its miners' exercise of complaint rights protected by § 105(c)(1) of the Act. Billy Wise, who has served as a member of the mine safety committee and grievance committee and as vice president of the local union, testified that Respondent did not like to have employees turn in violations to federal or state inspectors and that many employees did not report violations because they were afraid of reprisal. (Tr. 101-102.) Harry Gallagher testified that an assistant mine superintendent had told him not to tell government inspectors or safety committee members about violations. (Tr. 124-127, 132.) Jerald Stephens, president of

the local union, testified that some miners were hesitant to report conditions to inspectors "because they don't want to put their jobs in jeopardy." (Tr. 139.) I credit the testimony of the above witnesses.

I do not accept Respondent's contention that it was motivated to reprimand Keller because he left his work area without permission. Gallagher was not reprimanded for searching for bond block at the same time Keller searched a different entry for bond block. The evidence showed that Keller and Gallagher were simply following a mine custom and practice in looking for bond block away from the immediate construction site. Employees in the past had followed this practice and there was no evidence of any other employee being reprimanded for searching for work materials without permission of a foreman. I find that Respondent's contention that Keller was reprimanded because he left the work area without permission was a mere pretext.

Respondent, through its mine superintendent, John Snyder, reprimanded Keller because he had reported safety violations to a safety committeeman and to a state inspector, and threatened Keller with discharge if he ever reported safety violations to a federal or state inspector or to a safety committee member in the future. This reprimand and threat interfered with Keller's right to engage in protected activities under § 105(c) of the Act and therefore violated that section. Considering all of the criteria for a civil penalty in § 110(i) of the Act, a civil penalty of \$1,200 is assessed against Respondent for this violation.

Respondent has a policy that mine employees must first report safety hazards or violations to a supervisor or mine management before they report them to a government mine inspector or a safety committee member. The local union president, Jerald J. Stephens, who has been employed at this mine for 19 years, described the policy as follows: "the practice is report things to your immediate foreman first and then if you get no satisfaction, then you are to go on to your steps, which you see your safety committeeman or the state or federal agency" (Tr. 147). This same policy is illustrated by the mine superintendent's answers to the following questions (Tr. 183-184):

JUDGE FAUVER: When you talked to Keller and Stephens, the thrust of what you were saying to Keller seems to have been that he was causing unnecessary citations for this mine.

THE WITNESS: I think the thrust of the conversation was that he needlessly got us two citations because he left his immediate work area to go out there and tell Simmons. He could have very well got on the phone and called his immediate supervisor and had them corrected the same way.

JUDGE FAUVER: This is something that could have been done kind of in the family without involving the state inspector?

THE WITNESS: Correct.

JUDGE FAUVER: Had the inspector gone down the belt entry and had Keller been mixing the block bond and working on the overcast and if he had told the inspector about these two violations at that point, would you have reprimanded or cautioned him?

THE WITNESS: I don't know if I would have personally said anything but I would have maybe had his front-line supervisor again go over the important step they should bring their problems to mine management and then we don't have to receive a citation to get every little thing that they think is wrong corrected.

JUDGE FAUVER: Do you believe that that kind of communication to Keller would be a discouragement of his exercise of a right to talk to an inspector who is in his work place?

THE WITNESS: No, sir.

Respondent's policy inhibits miners from reporting alleged violations or dangers to inspectors or safety committee members; it is an unjustified interference with their exercise of rights under § 105(c)(1) of the Act, and therefore violates that section.

In Local Union No. 1110 and Carney v. Consolidation Coal Company, 1 FMSHRC 338 (1979), the Commission held that a reprimand of a safety committee member for leaving his assigned duties to report an alleged safety violation or danger to MESA, the predecessor to MSHA, violated § 110(b) (the anti-discrimination section) of the 1969 Mine Safety Act, which is the predecessor to § 105(c)(1) of the 1977 Act. It also held that the company's "permission policy" -- requiring the company's permission before a member of the safety committee could leave his assigned duties to report safety complaints to federal inspectors or their agency -- violated the 1969 Act's anti-discrimination provision. The Commission affirmed Judge Broderick's order to Consolidation Coal Company to "cease and desist from enforcing a policy requiring [the Company's] permission before a member of the Mine Health and Safety Committee can leave his assigned duties to bring safety complaints to the Secretary" (id., at 340).

In the instant case, the Secretary is similarly entitled to a cease and desist order regarding Respondent's violative policy of requiring employees to report alleged violations or dangers

first to a supervisor before reporting them to a government inspector or a safety committee member. This ruling does not relieve or affect a miner's obligation to report a violation or hazard to his supervisor where special circumstances, e.g., a work refusal, create such a duty. For example, in a work refusal case, the following legal principles apply (quoted from the Commission's decision in S & M Coal Company, Inc., et al (Slip Op. p. 6; Sept 26, 1988)):

A miner has the right under section 105(c) of the Mine Act to refuse to work if the miner has a good faith, reasonable belief that continued work involves a hazardous condition. Pasula, supra, 2 FMSHRC at 2789-96; Robinette, supra, 3 FMSHRC at 807-12. See also, e.g., Metric Constructors, supra. Where reasonably possible, a miner refusing to work ordinarily must communicate or attempt to communicate to some representative of the operator his belief that a hazardous condition exists. Reco, supra, 9 FMSHRC at 955; Dunmire & Estle, supra, 4 FMSHRC at 133-35. See also Miller v. Consolidation Coal Co., 687 F.2d 194, 195-97 (7th Cir. 1982) (approving Dunmire & Estle communication requirement).

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Respondent violated § 105(c)(1) of the Act on July 6, 1987, by reprimanding and threatening William J. Keller for engaging in activities protected by that section.
3. Respondent's policy of requiring employees to report alleged mine safety or health violations or dangers first to a supervisor or mine management before reporting them to a government inspector or a mine safety committee member violates § 105(c)(1) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondent shall pay a civil penalty of \$1,200 within 30 days of this Decision.
2. Respondent shall cease and desist from reprimanding threatening, or otherwise discriminating against employees for engaging in protected activities under § 105(c)(1) of the Act.
3. Respondent shall cease and desist from enforcing a policy of requiring employees to report alleged mine safety or health violations or dangers first to a supervisor or mine

management before reporting them to a federal or state inspector or a mine safety committee member.



William Fauver
Administrative Law Judge

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U. S. Department of Labor, Room 14480 Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Michael R. Pelesh, Esq., Consolidation Coal Company, Legal Department, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10TH FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

APR 12 1989

PAULA L. PRICE, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 86-45-D
: VINC CD 85-18
: MONTEREY COAL COMPANY, : Monterey No. 2 Mine
Respondent :
:

DECISION

Appearances: Linda Krueger MacLachlan, Esq., 314 North Broadway, St. Louis, Missouri for the Complainant; Thomas C. Means, Esq., Crowell & Moring, Washington, D.C. for the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Paula L. Price under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging discrimination by the Monterey Coal Company (Monterey) in violation of section 105(c)(1) of the Act.^{1/}

1/Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject

In her Complaint to the Secretary of Labor and to the Federal Mine Safety and Health Administration (MSHA) on July 15, 1985, pursuant to section 105(c)(2) of the Act²/ Ms. Price alleged as follows:

2/Section 105(c)(2) of the Act provides as follows:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners, alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing order appropriate relief. Such order shall become final 30 days

On July 15 1985, Monterey Coal implemented the policy of Mandatory Metatarsal footgear, to cut down on foot injuries in the mine. The Company provided us with the first pair of boots, but I have been having problems with the fit of the boot I chose from the very limited selection they offered. The women were offered 4 styles while the men were offered between 12 to 20 styles. Monterey says if the shoes we were provided do not fit, we must find ones that do, dictating also the type of metatarsal we are allowed to wear. (no clip on type) I feel if Monterey makes this requirement, then the expense of providing a sufficient selection of boots that are fitted properly and comfortably should fall on them. If this is not possible or practical to provide, the rule should be revoked for everyone. The boots I had to wear caused blisters and severe feet and leg cramps. They hindered my ability to walk and were a safety hazard. Also the cramps in my feet and legs stopped me from getting adequate rest. After wearing their boots two days, I went to the safety department and tried to get some temporary approved clip on type because I could hardly walk. Only after having to leave the mine early in my shift on July 19, 1985, and seeking medical treatment from my doctor, then Monterey allowed me the clip on metatarsals. Monterey refuses to acknowledge this as a work related injury even though they required me to wear their boots or the alternative of not work.

cont'd fn.2

after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

In a letter apparently accompanying the above Complaint to MSHA Ms. Price further stated as follows:

I hereby file a complaint of 105(c)(2) discrimination by my employer in retaliation for my safety and health efforts for myself and other employees. My actions occurred on 7-19-1985 at approximately 2:30 AM. I could no longer tolerate the pain in my legs and feet caused by the now mandatory metatarsal safety boots I am now required to wear by Monterey Coal Company. They do not fit properly and comfortably, and are a safety hazard because they hinder my ability to walk comfortably and would prevent a safe and expedient exit from the mine, should it become necessary because of an emergency at the mine. Leg & foot cramps are a hinderance to my getting adequate and essential rest. The company actions of discrimination occurred on July 15, 1985, by requiring all workers to wear metatarsal protection then dictating what type of metatarsal we are allowed to wear, while refusing to permit an approved add on type of metatarsal, without furnishing adequate and proper fit for all workers. The person responsible for the company action is Gordon Roberts, superintendent of the #2 Mine. Witnesses with similar problems are listed below.

Ms. Price subsequently, on August 26, 1985, submitted an additional statement to MSHA further expanding on her Complaint. The statement reads as follows:

On Monday, August 12, 1985, I received my second pair of work boots with metatarsal guards from Monterey. These were replacement boots sent from Hy-Test because my first pair was sent in to them to check for defects. The first pair was size 7E and the replacement pair they sent was size 7D. I can't wear a size 7D because of my wide feet. I took them home and wore them at home and tried to break them in for several days but I couldn't keep them on my feet for more than an hour. When I went to on Thursday Ben Chauvin, Mine Manager,

questioned me as to where my new boots were and I told him they were at home and that I was trying to break them in because they hurt my feet. I was wearing the clip-on type metatarsal guards which had been provided by Monterey to wear until my boots were sent by Hy-Test. Several other employees had been given these Hy-Test type to wear while their boots came in (Special ordered sizes). Monterey routinely gives out these clip-on type guards to visitors and inspectors when they come to the mine. Chauvin then told me that on Monday, August 19, 1985, I had to turn in the clip-on guards and be wearing integral metatarsal guard boots or he would not let me go to work.

On Monday, August 19, 1985, I reported to work and turn in the clip-on guards but I wore another set of clip-ons that belonged to me on my boots. I still could not wear the boots provided by Monterey because they were not the right size for my feet. Chauvin stopped me prior to entering the mine and told me that I could not work because I did not have my boots on, I then left the mine. I returned on Tuesday, got dressed to go below still wearing the clip-on guards. I then met with Dave Longe, Head Mine Manager, and Chauvin and Longe advised me to turn my new boots in to the workhouse as suggested by a Hy-Test representative I had talked to if they were not the right size. Chauvin again told me that I could not go to work with just the clip-on guards on. I then left the mine. Longe stated that the two days I missed would be considered AWOL or unexcused absence days. On Wednesday, August 21, 1985, I went to work again and met with D. Longe and Chauvin and was read a letter of suspension, suspending me until August 26, 1985, because I had failed to follow Chauvin's directions to wear my boots with integral metatarsal guards. If I failed to do so there would be further disciplinary action which may include suspension with intent to discharge. I returned to the mine on Thursday to see if Monterey would accept the clip-on type guards if they were permanently attached to my regular work boots. I had found a cobbler that told me he could attach them to my boots if I provided the metatarsal guard. After about 1 1/2 hours I was told that Gordon Roberts, Supt., had decided that the guards would satisfy the company metatarsal policy with certain stipulations; the altered metatarsal would overlap the steel toe, the work would

have to be done by a certified cobbler and done in a workmanlike manner, and that it be done by August 26, 1985. Larry Krupnik, Safety, gave me the stipulations. I was led to believe that if I did all this I could return to work on August 26, 1985. However it will be Chauvin's decision to let me work or not. I then took my boots to the cobbler and had the work done. I feel that I have been discriminated against because I was not allowed to work on August 19 and 20, and was then suspended for the 21, 22, and 23. I did not have proper boots to wear but I was willing to wear the clip-on guards on these days until I got boots that I could wear. Other employees had been allowed to work with the clip-on types until their boot problems were resolved. Monterey then changed their position and is willing to let me work with clip on types if I get them permanently attached. I am requesting the pay for the days I was not allowed to work because I could not comply with Monterey's request to wear integral metatarsal boots even though I was willing to work with clip on guards which Monterey accepts for visitors and inspector to comply with their metatarsal protection policy.

Subsequently by letter dated December 16, 1985, the Complainant notified the MSHA attorney then handling her case that she had achieved a partial remedy to her Complaint. The letter reads as follows:

After your phone call today, I'm writing to confirm that Monterey paid me 4 of the 5 days pay I asked for. I still feel they owe me the 5th day. The 5th day they still owe me should have been my idle Friday to work. Eight hours at 14.42 per hours plus 30 cents per hour shift differential which totals to \$117.76. I would also like any and all reference due to this policy, concerning any disciplinary action taken by Monterey, and any derogatory inferences concerning my performance as an employee, to be removed from my file.

Thereafter by letter dated January 7, 1986, Ms. Price was notified by MSHA as follows:

Your complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977 has been investigated by a

special investigator of the Mine Safety and Health Administration (MSHA).

A review of the information gathered during the investigation has been made. On basis of that review, MSHA has determined that your complaint of discrimination has been satisfied and that no further pursuit of the complaint is required.

If you should disagree with MSHA's determination, you have the right to pursue your action and file a complaint on your own behalf with the Federal Mine Safety and Health Review Commission at the following address:

Federal Mine Safety and Health Review Commission
1730 K Street, N.W.
Washington, D.C. 20006 (202) 653-5629

Section 105(c) provides that you have the right, within 30 days of this notice to file your own action with the Commission.

In her Complaint to this Commission pursuant to Section 105(c)(3) of the Act³/

3/ Section 105(c)(3) provides in part as follows:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order based upon findings of fact dismissing or sustaining the complainant's charges

Ms. Price stated as follows:

My complaint of discrimination, I do not feel has been satisfied. I am requesting relief of \$117.76 for the idle day of 8-23-85. I have been paid [sic] for the preceding four days (Mon thru Fri) of that week in which Monterey refused me the right to work and then suspended me. I would also like, for my relief, any and all reference due to this policy concerning any disciplinary action taken by Monterey, and any derogatory inferences concerning my performance as an employee, to be removed from my file.

At a subsequent preliminary hearing held in response to Moterey's Motion for a More Definite Statement and in an attempt to clarify the nature of the complaint and the relief sought, Ms. Price stated that she was seeking as damages, pay for one eight hour shift for the "idle" day on August 23, 1985, expenses (postage and phone calls) related to the litigation of her complaint (presumably including expenses relating to the pursuit of her grievance resulting in the recovery of four days pay for August 19 - 22, 1985) and "a pair of boots that fit".

Based on my best understanding of her somewhat rambling and ambiguous complaints I conclude that in substance Ms. Price's Complaint of Discrimination as it is now before me is that she was suspended from work by Monterey because she in essence refused to perform work under a work rule that

cont'd fn. 3

and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, and order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation....

was unhealthful and unsafe as applied to her.⁴/ It is undisputed that Monterey refused to allow Ms. Price to work on August 19 and 20, 1985, and that she was suspended on August 21 and August 22, 1985, because of her refusal to wear integrated metatarsal work boots which she maintains did not fit, caused foot injuries and created an unsafe and unhealthful condition. While Ms. Price also claims she was denied the opportunity to work an "idle" workday on August 23, 1985, there is a separate dispute as to whether she was in any event scheduled to work that day and therefore entitled in any event to be paid for such work.

Within this framework it is apparent that the legal analysis applicable to "work refusals" must be applied to this case. Under that analysis a miner's "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. Simpson v. FMSHRC, 842 F.2d 453 (D.C. Cir. 1988); Miller v. FMSHRC, 687 F.2d 1994 (7th Cir. 1982); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981).

By way of background, it is not disputed that sometime before the incident at issue Monterey had conducted studies of foot injuries leading to the conclusion that its underground miners should be required to wear protection for the metatarsus. Monterey was apparently also aware of a decision by the West Virginia State Board of Coal Mine Safety and Health that many foot injuries might have been prevented

⁴/In her post-hearing brief Ms. Price has alleged other acts of discrimination. To the extent however that these allegations were not first presented to the Secretary under the procedures set forth in section 105(c)(2) of the Act she has neither exhausted her administrative remedies nor met a statutory condition precedent. The merits of these allegations are accordingly not properly before me. Moreover the complaint in this proceeding has never been properly amended to incorporate these new allegations, the allegations cannot be considered as having been timely filed and the allegations do not in any event comport with the requirements of Commission Rule 42(a), 29 C.F.R. § 2700.42(a). In addition as noted, infra, she has obtained all of the remedies requested in her complaint herein except those to which she is not otherwise entitled.

or might have been less severe if the injured person had been required to wear metatarsal protective boots. Monterey also concluded that an integrated metatarsal guard rather than a temporary clip-on guard was preferable. Studies showed problems with clip-ons including evidence they tended to come loose. It also appears that the clip-on type of metatarsal guards had not passed ANSI standards unlike the integrated metatarsal type boot.

In implementing its new policy Monterey agreed to pay for an initial pair of integrated metatarsal boots for each miner and contracted with two companies to bring "shoemobiles" to the mine. The miners were not prohibited from obtaining their integrated metatarsal boots from other sources but were told that the company would pay only for the cost of the initial pair of boots selected from one of these two vendors. According to Monterey the selection and fit were to be the employee's responsibility. Both of the selected shoe companies reported however that they could make any size as a special order and employees were apparently advised to place orders with the vendors if a special size was required.

Monterey apparently also anticipated that some miners might nevertheless be unable to obtain proper fitting boots by the July 15, 1985, deadline when the policy would take effect. Those who anticipated difficulty locating appropriate boots were advised to see Safety Supervisor Larry Krupnick for assistance. A list of miners who were unable to obtain proper boots due to circumstances beyond their control was provided to shift managers so that these miners would be permitted to work with only the temporary clip-ons until they obtained their shoes. It was Monterey's policy that ordinarily other miners would not be permitted to start work without integrated metatarsal protection except for unusual situations to be dealt with on a case-by-case basis. Monterey anticipated rigid enforcement of the new policy and managers were apparently advised that exceptions from the policy would be closely monitored for abuse.

Ms. Price was one of the listed miners. She advised Monterey that the boot she had selected from the Hy-Test company was not in stock and had to be special ordered. She thereafter reported to work in her new integrated metatarsal boots on July 16, 1985. It is not disputed that she began experiencing discomfort with the new boots and complained to various individuals including her foreman Don Overturf. Ms. Price maintains that she also complained around that time to

an unidentified clerk in the Safety Department and purportedly requested permission to use temporary clip-on guards so she could alternate wearing her new boots with her old boots. This person apparently told Ms. Price that he did not have the authority to allow her to do so.

Ms. Price described her injuries at this time as:

More like a bruise rather than--across the toes rather than a bubbly blister. I didn't have what I would call a raised blister until Wednesday [July 18].

As she continued to work with her new boots the problems increased. She described the problems as follows:

The marks on the front of the toes became deeper. And the heels started--they still felt very, very bruised on the back part of my heel. There was no [sic] marks on the back part of my heels. It just hurt inside of my heel. And before the end of the day I--I was having cramps from below the knee down, in the calves of my legs, causing cramps in those. And it just--it's indescribable. (Laughs) It felt like I had a toothache from the knee down. It ached inside your muscles from walking. Well, you walk funny so you don't rub your foot any more and walk--well, you walk slow so--so your not going to rub anything else any more to make anything in your toes hurt. (Laughs) And then you walk funny, well, it pulls on muscles that you haven't used in that way for a while and it creates tension in your muscles and causes them to ache." (Tr. 486-487)

Price described the condition of her feet from the new boots after completion of her shift on Tuesday, July 17 as follows: "[t]hey were much, much redder and the top layer of skin on both feet, across the top of the toe was not

down to go to bed and you'd start to relax you'd be laying flat of [sic] your back and my toes were curling down with both feet going into a charley horse. Maybe not both feet at one time but maybe my right foot and then later my left foot and maybe both feet. But this was going on all day. And you couldn't even sleep because every time you started to relax your feet went.... (Laughs.) (Tr. 490)

Other employees were having similar problems with their new integrated metatarsal boots. Ms. Price recalled conversing with her foreman Don Overturf about the problems of another employee who had open blisters on both heels. She also discussed her own problem with Overtuff and purportedly told him as follows:

I thought these boots were pretty silly because they were seeming to create a bigger safety hazard by wearing them than they were.... you know, the metatarsal was supposed to be an extra safety factor for us and I wasn't arguing against that because it would protect the top of your foot. But to crippe-up all the rest of your foot--. (Tr. 493).

Overturf acknowledged in his testimony that he "had heard some complaints about her boots a time or two" (Tr. 1358). He recalled that she complained of leg cramps and "she felt that her shoes were causing her not to be able to perform her job properly" (Tr. 1359).

Price testified as follows concerning the condition of her feet after working on July 18.

By then I had small raised portions on the top of my toes close to the foot, not at the bottom of my toe. My heels were very painful, very, very tender. There were no obvious marks on my heels. I didn't have any blisters or large red heels, nothing like that. It was--the visible marks were on my toes and they were raising the layers of skin to have small little bubbles, you know, not a big one but with large red marks in the whole area, pressure marks like.*** My legs were aching below the knee on down. It was very, very miserable. And when I would take my boots off in the locker room, then the cramps in the arches would get worse. When I

would sit down and take--like my body weight pressure off of them, when my feet would relax they would cramp up. (Tr. 578).

Price also testified that she had trouble sleeping because of the cramps, had "charley horses" in the arches of her feet and was awakened 2 or 3 times because of this (Tr. 578-579).

Price further testified that at the beginning of her shift on July 19, her feet continued to be "very painful" and "it was very hard to walk anywhere" (Tr. 582). She again complained to Overturf that the boots were unsafe because of the crippling effect (Tr. 583). She nevertheless began working in her job as a continuous miner operator and rotated duties as a continuous miner helper keeping the power cable from being run over. Price testified that during this time her "feet hurt so bad I also felt sick, I just--I was in misery" (Tr. 587).

Because of the "aching, the blisters, the very painful heels that felt very, very bruised" she returned to the shop area to see Overturf and to arrange for a ride out of the mine (Tr. 588). She removed her shoes and socks and showed Overturf her feet. She then left the mine and reported to the nurse's station where she showed "the blisters, the red marks, all the pressure marks on the top of my toes" to the nurse on duty (Tr. 592). Price maintains that she had three blisters on each foot located on top of her toes (Tr. 592). Overturf reported the redness but did not report observing blisters and, apparently consistent with Monterey's policy that blisters from ill-fitting clothes were not work related, classified the condition has non-work-related. On July 20, 1985, Ms. Price visited a doctor who prepared a note indicating that she should not wear the boots and that she then had vesicles^{5/} on her feet.

^{5/} "Vesicles" are defined as a circumscribed, elevated, fluid-containing lesion of the skin, 5 mm or less in diameter. Dorland's Pocket Medical Dictionary, 21st edition, W.B. Saunders Co.

On her return to work on July 22, 1985, Price presented the doctor's note to Ben Chauvin, the Shift Mine Manager, and filed a safety grievance under the collective bargaining agreement. She was given temporary clip-on metatarsal guards to use with her old boots and a one-week exemption from the policy.

Price continued to have cramps in her feet and sought additional medical care on July 24, 1985. She apparently also sought advice from this specialist concerning how to find boots meeting the Monterey policy. She filed another grievance under the collective bargaining agreement on July 24, 1985, over the company's denial to excuse her shift and to treat her injury as work-related. The grievance was settled on July 26, with a written agreement that states as follows:

The appropriate manufacturing representative shall be contacted regarding this employee's shoes.

After such contact is made and a determination given by the manufacturer, the employee shall make necessary arrangement for providing footwear that meets management standards for metatarsal shoes.

Ms. Price was also then given an extended exemption and was allowed to wear temporary clip-ons until her boots were returned or she obtained new boots. The Hy-Test manufacturer was contacted and the boots were returned for evaluation. Hy-Test later told Safety Supervisor Larry Krupnick that it had not found the boots defective but would nevertheless replace them with a smaller size at no charge. According to Krupnick Hy-Test advised Price that she should be sure the replacement boots fit before she wore them in the mine.

Ms. Price received the new boots on August 12, 1985. She attempted to break them in at home over several days. She had already tried the same size boot (Size 7-D) at the shoemobile and found that they cut into her toes. On August 18, 1985, shift manager Chauvin told Price that she would be expected to report to work with these boots on the next working day or she would not be allowed to work. Price purportedly told Chauvin that the replacements were the wrong size, that they hurt her feet and that she had tried without success to break them in. She told him that she planned to discuss the problem with Hy-Test the next time the shoemobile was on the premises. Chauvin then apparently told Price that her "time was up" and that she would have to turn in the temporary clip-ons the next working day (Monday, August 19, 1985) and comply with the policy.

It is not disputed that, in an apparent effort to comply with the policy, Price then visited the "London Bootery" and was told that the replacement boot might no longer comply with Federal regulations governing steel-toe boots if the steel toe was stretched and that they had no integrated metatarsal guard boots in her size in stock except other Hy-Test boots. She also inquired if they would attach a metatarsal to one of the Red-Wing brand boots that she had been buying for the previous eight years but they apparently declined for "liability reasons". Price also contacted the MSHA investigator who was handling her complaint and purportedly was told that Monterey's threat was so unreasonable that it would not implemented on August 19. Price maintains that union representatives including an attorney also agreed with this assessment of the situation.

On August 19, 1985, the Complainant turned in her company issued clip-ons and reported for work in her old boots with another pair of temporary clip-ons. Chauvin refused to permit her to work in these clip-ons and she was marked "AWOL". Price explained to Krupnick that the replacement boots did not fit and that she had tried everything she could think of to come up with another pair of boots but had been unsuccessful. When she nevertheless attempted again to go to work she was refused entry to the elevator. She then filed another grievance under the collective bargaining agreement stating that there was "no reason whatsoever for them to be denying me work, it was unsafe to require me to wear something that didn't fit my feet". It was around this time that Krupnick also told Price that the company had fulfilled its responsibility by having furnished her a pair of boots. According to Price she was told that it was her responsibility to deal with the vendor directly.

Before reporting to work on the night shift of August 20, 1985, Price obtained a note from her doctor indicating that she needed special-made boots to be able to comply with the policy. This note was given to Monterey the same day. She also called the Hy-Test shoe company before reporting to work and was told to return the boots to the warehouse. She returned the boots and then reported to work in her old boots with temporary clip-ons. She told Chauvin that she no longer had the boots and that she had returned the replacements for the "correct" size at Hy-Test's direction. She was again denied permission to work and was suspended for failure to follow orders to wear integrated

metatarsal safety boots. She was also warned that failure to wear the proper shoes the following morning could result in discharge.

Price apparently continued in her efforts to resolve the problem when she and Safety Committeemen Burkholder went to the office of Mine Superintendent Lange. They informed Lange that Price's doctor had submitted a note stating that she was not to work in the replacement boots, that at Hy-Test's direction replacement boots had been turned in for exchange and that Ms. Price had been unable to locate any integrated metatarsal boots that fit her feet. Lange apparently told Price to retrieve her boots from the warehouse and to wear them. Before her shift on August 21, Price again called various shoe stores and confirmed that no store had any other brands in stock other than the brands already tried. She determined that any other integrated metatarsal boots would have to be special ordered taking at least two weeks. She again reported to work in her old boots with clip-ons on August 21. She was again denied work and when she and Burkholder again went to Lange's office to complain, they were told she was suspended until August 26, 1985. She was also told to report to work at that time in boots with integrated metatarsal work shoes.

On the following day, August 22, Richard Morlegan another employee, reported to Mine Superintendent Roberts that the boots which the Company had been special-ordered for him did not fit properly. He asked if he could cut the integrated metatarsal off the new boots and have it reintegrated by a cobbler onto another pair of boots that did fit. Roberts approved this procedure. Later that same afternoon Price asked Roberts if she could have a metal clip-on guard attached to her existing boots by a cobbler. After conferring with other officials Roberts granted Price's request. The boot policy was according revised and posted the following Friday, August 23. Price thereafter returned to work and apparently has continued to work wearing her old boots with a metatarsal guard permanently attached.

On August 28, 1985, the union filed a grievance under the collective bargaining agreement for the days Price was marked "AWOL" and suspended and demanded payment for an "idle" day and for her out-of-pocket expenses. The grievance was settled by the union for four days pay in return for the withdrawal of her other demands. The Complainant was not present at the settlement meeting. She maintains that she

did not consent to the settlement and was not even told about it until several days later. According to Price she was not compensated for the loss of pay for an "idle" work day on August 23, for a free pair of integrated metatarsal boots that fit and for her expenses.

The above narration of evidence is essentially undisputed and I find it to be credible. Within this framework I find that the Complainant has met her burden of proving that her refusal to comply with Monterey's work rule requiring the wearing of an integrated metatarsal boot on August 19, 20, 21, and 22, 1985, was a protected work refusal based on a good faith, reasonable belief that it would have been hazardous to comply with. The credible evidence supports a finding that Ms. Price made good faith and reasonable efforts to obtain properly fitting integrated metatarsal boots comporting with Monterey's policy prior to August 19, 1985, and continued with such efforts through August 22, 1985. Based on her prior experience with ill fitting boots the month before and her unsuccessful efforts to break in another pair of boots and obtain properly fitting boots at the time of her suspension it is also clear that she then entertained a good faith, reasonable belief that it would have been hazardous to have worked in ill-fitting boots.

Indeed Monterey does not appear to challenge Ms. Price's complaint that the boots she had obtained did not fit properly and caused injuries to her feet. Not only would the wearing of such boots in itself present a hazard of possible infection from abrasions and blisters but, as Ms. Price points out, could present a stumbling hazard and interfere with the safe evacuation of the underground mine should an emergency develop. Since it is undisputed that Monterey refused to allow Ms. Price to work based on her refusal to wear the integrated metatarsal boots on August 19 through 22, 1985, it is clear that the denial of such work was motivated solely by her refusal to wear such boots.

It is also apparent from the history of the problem that Ms. Price had communicated to various company officials, including Don Overturf and Ben Chauvin, the hazardous nature of wearing ill-fitting integrated metatarsal boots. The "communication" requirement has accordingly been met. See Simpson supra.; Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (1982).

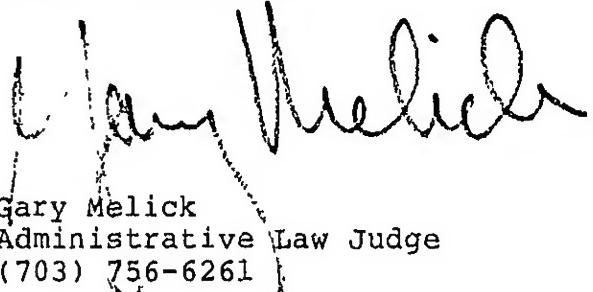
Accordingly Ms. Price is entitled to lost pay for the period she was denied opportunity to work i.e. four days pay for August 19 through 22, 1985, as well as those costs directly related to the prosecution of this claim in the grievance proceeding below. She is also entitled to recover her costs in these proceedings necessary to recover the costs related to the grievance proceedings. I do not find however that Ms. Price is entitled to a company-paid pair of integrated metatarsal boots. She has of course, consistently maintained that she cannot find any such boots that fit her. In any event the Monterey policy was changed at her request to permit her to wear her old boots with a professionally attached metatarsal guard. Ms. Price then elected this alternative thereby waiving any claim to the company paid integrated metatarsal boots.

Ms. Price also makes the bald assertion that she is entitled to one day "idle" day pay for August 23, 1985. I do not however find that she has sustained her burden of proving that she would have been entitled to such pay in any event. Indeed the Complainant's own evidence through the testimony of the union local president Jim Kimball, is that she was not entitled to "idle" day pay on August 23rd (Tr. 732-733). Another of Complainant's witnesses, union committeeman Ron Burkholder, also failed to support her claim (Tr. 2468-2469).

ORDER

Based on the foregoing decision I find that the Complainant is entitled to reimbursement for her initial costs (alleged to be postage and phone calls) in prosecuting her grievance leading to her retrieval of four days pay (August 19, through August 22, 1985) and her subsequent costs in the instant proceedings to recover those costs. Any petition for such costs as well as any petition by Respondent must be filed with the undersigned on or before May 1, 1989. The parties are directed to file any response to such petition(s) on or before May 12, 1989. Monterey Coal Company is further directed to delete from its records any reference to disciplinary action taken against Ms. Price for her refusal to wear integrated metatarsal boots in August 1985.

Monterey Coal Company has also alleged "nonfeasance and malfeasance" by Complainant's trial counsel. Any such allegations must be directed to the Commission under its Rule 80, 29 C.F.R. § 2700.80. This decision is not a final disposition of these proceedings and no final disposition can be made until the issue of costs is determined.



Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

Michael J. Hoare, Esq., 314 North Broadway, St. Louis, MO 63120 (Certified Mail)

Thomas C. Means, Esq., Crowell & Moring, 1001 Pennsylvania Avenue., NW, Washington, DC 20004-2505 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

APR 14 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 88-87-M
Petitioner	:	A.C. No. 31-00064-05515
v.	:	
	:	Belgrade Quarry
MARTIN MARIETTA AGGREGATES,	:	
Respondent	:	Docket No. SE 88-97-M
	:	A.C. No. 31-00048-05511
	:	
	:	New Bern Quarry

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner (Secretary); W. Scott Hunt, Safety Engineer, Martin Marietta Aggregates, Rocky Point, North Carolina, for Respondent (Martin Marietta).

Before: Judge Broderick

STATEMENT OF THE CASE

Each docket involves a single citation charging a violation of 30 C.F.R. § 56.16006 because stored oxygen and acetylene tanks were not provided with covers over the valves. The first citation involved tanks at Respondent's Belgrade Quarry, the second involved tanks at the New Bern Quarry. Respondent denies that it violated the standard, and asserts that the tanks were not stored, but were in use. The cases were consolidated for the purposes of hearing and decision. Pursuant to notice, they were heard on March 14, 1989, in Jacksonville, North Carolina. Inspector Ronald D. Lilly testified on behalf of the Secretary; William Fennell and Lynwood Yates testified on behalf of Martin Marietta. At the conclusion of the hearing, each party orally argued its position on the record, and waived its right to file a post hearing brief. I have reviewed the entire record and considered the contentions of the parties, and make the following decision.

FINDINGS OF FACT

Respondent Martin Marietta Aggregates is the owner and operator of aggregate mines in Onslow County and Craven County, North Carolina, known as the Belgrade Quarry and the New Bern Quarry. The mines produce stone which enters interstate commerce. There is no evidence in the record as to the size of the operator or either of the mines. The Belgrade Quarry has a history of ten violations during the 24 month period prior to the violation at issue here. The New Bern Quarry has a history of six violations during the 24 month period prior to the violation charged in these proceedings. The history is not such that penalties otherwise appropriate should be increased because of it.

CITATION 2859521 BELGRADE QUARRY

On June 26, 1988, an oxygen and an acetylene gas cylinder were located in the shop area of the Belgrade Quarry. They were located under a tin-roofed canopy and were securely chained to the steel leg of the canopy. The valves were turned off; the regulators and hoses were attached, and the valves were not covered. No workers were in the immediate area; a mechanic was seen in a truck across a small creek. Ronald Lilly issued a citation alleging a violation of 30 C.F.R. § 56.16006. At the time the citation was issued (11:00 a.m.), the Inspector did not observe any apparent tasks to be performed with the gas cylinders. The violation was abated and the citation terminated the following day, when Martin Marietta had placed the original covers on the cylinders. Later Martin Marietta constructed metal boxes over the top of the cylinders; the inspector considered the metal boxes as compliance with the requirement of a cover on gas cylinder valves even if the original covers were not in place.

CITATION 2859530 NEW BERN QUARRY

On July 6, 1988, an oxygen and an acetylene gas cylinder were standing upright at the shop of the New Bern Quarry. They were attached to the leg of the shop. The regulators and hoses were attached but the valves were not covered. There was no equipment in the shop. A mechanic was present in the shop, but there were no apparent tasks to be performed with the cylinders. The mechanic told the inspector that the cylinders "were used ... mostly every day." Inspector Lilly issued a citation for a violation of 30 C.F.R. § 56.16006. The violation was abated and the citation terminated the following day when the tanks were placed in a metal cage.

REGULATION

30 C.F.R. § 56.16006 provides:

Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

ISSUES

1. Whether the cylinders at the Belgrade Quarry were stored or in use when the subject citation was issued?
2. Whether the cylinders at the New Bern Quarry were stored or in use when the subject citation was issued?
3. If violations are established, what are the appropriate penalties?

CONCLUSIONS OF LAW

Respondent is subject to the provisions of the Mine Safety Act in the operation of its Belgrade and New Bern Quarries. I have jurisdiction over the parties and subject matter of these proceedings.

The crucial issue on which the parties disagree in this case is whether the cited compressed gas cylinders were "being stored" and thus required to have their valves protected by covers, or were "in use" and thus merely required to be protected by a safe location. It is not disputed that the gauges and hoses were attached, and therefore the cylinders were available for use, when the citations were issued. Neither is it disputed that the cylinders were not actually being operated at the time. Respondent argues that the cylinders are in use whenever the regulators, gauges and hoses are attached. Therefore, they are in use throughout the working day even between shifts. The Secretary takes the position that if the cylinders are not actually being used, and there are no apparent "tasks to be performed," i.e., there is no equipment in the area to be repaired or otherwise worked on, the cylinders are being stored.

In the case of Secretary v. Phelps Dodge Corporation, 6 FMSHRC 1930 (1984), Chief Judge Merlin concluded that gas cylinders which had not been used for two hours or more were "being stored temporarily or semi-permanently." He upheld a citation alleging a violation of 30 C.F.R. § 55.16-6. Judge Merlin relied in part on the Commission decision in FMC Corporation, 6 FMSHRC 1566 (1984) in which the temporary placement of explosives in a supply yard for more than an hour,

and some for more than six hours was found to constitute storage. The term storage, the Commission held, "is sufficiently broad to include short-term, long-term and semi-permanent storage ..."

The standard in § 56.16006 has two facets: (1) valves on gas cylinders shall be covered when being transported or stored; (2) the cylinders shall be in a safe location when in use. By a separate standard, namely § 56.16005, compressed gas cylinders are required to be secured in a safe manner.

In the Belgrade Quarry, there was no equipment at the site to be worked on, and there was no mechanic or other worker at the site to operate the gas cylinders. Full time welders, however, were employed at the quarry. Part of the time they worked with the cylinders involved here, and part of the time on welder trucks. There is no evidence in the record as to when the gas cylinders involved here were last used, or when they might next be used. The quarry is in operation from 7:00 a.m. to 5:00 p.m. The Martin Marietta official to whom the citation was served did not testify. I conclude that the evidence clearly establishes that the cylinders were not in use, but were in temporary storage under the Commission's definition of the term. Therefore, failure to cover the valves constituted a violation of the standard.

The facts surrounding the New Bern Quarry cylinders differ somewhat: the New Bern Quarry operated "[m]ost of the time around ... the clock," (Tr. 73-74), ten hours on production and fourteen on a maintenance shift. At the New Bern Quarry a mechanic was present in the shop area when the citation was issued. He was not called to testify. The Plant Manager testified that the tanks (cylinders) were "used all during the day." (Tr. 61) However, he also stated that he could not say whether they were used on the day the citation was issued, "but there's very seldom a day goes by when it's not used off and on during the day." (Tr. 67) Nor could he say whether they had been used the previous day, or how often they are used. Although the question is closer with respect to the New Bern Quarry than with respect to Belgrade, I conclude that the cylinders were not in use when the citation was issued but were in temporary storage. Therefore, failure to cover the valves constituted a violation of the standard.

PENALTIES

Each of the violations involved herein was assessed at \$20. The parties have agreed that if violations are established, the amount assessed is appropriate. The Secretary does not contend that the violations were serious or the result of more than negligence. However, I cannot ignore the fact that the

violation cited at the New Bern Quarry was the same as that cited more than a week previously at Belgrade. Therefore, I conclude that Respondent was guilty of greater negligence in permitting the violation to occur at New Bern. The violations were not serious because they were unlikely to cause injury. The conditions were abated promptly in good faith. The violations resulted from Respondent's negligence; the violation at New Bern resulted from a high degree of negligence. Based on the criteria in section 110(i) of the Act, I conclude that penalties of \$30 and \$70 are appropriate for the violations found.

ORDER

Based on the above findings of fact and conclusions of law Respondent is ORDERED to pay within 30 days of the date of this decision the following civil penalties.

<u>Citation</u>	<u>Penalty</u>
2859521	\$ 30
2859530	70
TOTAL	<u>\$100</u>

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Michael K. Hagan, Esq., U.S. Department of Labor, Office of the Solicitor, 1371 Peachtree St., N.W., Atlanta, GA 30367 (Certified Mail)

Mr. W. Scott Hunt, Safety Engineer, Martin Marietta Aggregates, P.O. Box 347, Rocky Point, NC 28457 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 14 1989

HERBERT M. KING, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 88-179-D
: MSHA Case No. BARB CD 88-27
SHAMROCK COAL COMPANY, :
Respondent : No. 10 Mine

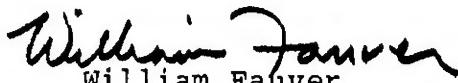
DECISION APPROVING SETTLEMENT

Before: Judge Fauver

The parties have moved for approval of a settlement and a dismissal of this case. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the purposes of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and this proceeding is DISMISSED.


William Fauver
Administrative Law Judge

Distribution:

Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., P.O. Box 360, Hazard, KY 41701 (Certified Mail)

Neville Smith, Esq., Smith and Smith, 110 Lawyer Street, Manchester, KY 40962 (Certified Mail)

iz

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 14 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-11
Petitioner	:	A.C. No. 15-16109-03501
v.	:	
	:	Greenwood No. 12 Mine
SHAMROCK COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN, for
Petition;
Neville Smith, Esq., Smith & Smith, Manchester,
KY, for Respondent;

Before: Judge Fauver

This civil penalty proceeding was brought by the
Secretary of Labor under § 110(a) of the Federal Mine Safety
and Health Act of 1977, 30 U.S.C. § 801 et seq.

Based upon the hearing evidence and the record as a
whole, I find that a preponderance of the substantial,
reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. Shamrock Coal Company's Greenwood #11 and #12 Mines,
located in MSHA's District 7, are physically separate,
underground coal mines. They are one mile apart, and access
into the mines is gained through separate entries. There are
no innerconnections between the mines and one cannot travel
underground from one mine to the other. The mines have separate
MSHA identification numbers.

2. Before 1985, Shamrock had operated a different mine
with several sections that were five or six miles apart,
under one MSHA identification number. Under the policy in
force in District 7 at that time, one set of mine plans would
suffice for the entire mine.

3. Since 1985, however, MSHA District 7 has required a separate mine identification and separate mine plans for each physically separate and distinct mine.

4. On May 13, 1987, Gordon Couch, Safety Director of Shamrock, submitted one set of plans seeking to cover Mines #11 and #12 as one mine, called the "Clinton Mine." The plans called for Mines #11 and #12 to be identified as sections 001 and 002 of the Clinton Mine. H. R. Boston, an MSHA Supervisory inspector, advised Shamrock's representative that the proposed "Sections 001 and 002 would have to be treated as two separate mines" (Tr. 50).

5. About the same date, May 13, 1987, Jimmy Sams, an engineering assistant in Shamrock's Manchester office, advised Mr. Couch that MSHA required two separate ventilation plans for Mines #11 and #12.

6. Also on May 13, 1987, John Pyles, an MSHA staff assistant in District 7, advised Mr. Couch that two separate sets of plans were required for Mines #11 and #12.

7. Respondent started developing the Mine #11 coalbed in late June, 1987, with approved plans for that mine. It started developing the coalbed in Mine #12 during the first or second week of July, 1987, without approved plans for Mine #12.

8. On July 23, 1987, MSHA received an undated legal identity form from Shamrock for Mine #12.

9. On July 27, 1987, Inspector Elmer G. Keen inspected Mine #12 and found that Shamrock was developing the coalbed without approved mine plans. The approved plans for Mine #11 did not cover Mine #12 either as a section of Mine #11 or as a separate mine.

10. At 11:00 a.m. (first shift) on July 27, 1987, Inspector Keen issued Citation 2797706 at Mine #12, charging a violation of 30 C. F. R. § 75.1721, for developing the coalbed without approved plans for the mine.

11. The inspector terminated the citation on the same shift on July 27, 1987, based upon the company's representations that the miners would be pulled from the mine, production would stop and would not resume until the required plans for Mine #12 were submitted and approved.

12. Shamrock employees left Mine #12 on July 27, 1987, as observed by Inspector Keen, but they stayed out only for

the remainder of the first shift. The mine resumed operations that night.

13. A few days later, on July 30, 1987, MSHA Inspector Don McDaniel discovered that Mine #12 was still operating without approved plans and issued Citation 3004642, charging a violation of 30 C.F.R. § 75.1721(a), which states in relevant part: "[T]he operator shall not develop any part of the coalbed in such mine unless and until all preliminary plans have been approved." The required preliminary plans are identified in subsection (b) of that section.

14. Inspector McDaniel set an abatement time of one hour for Respondent to produce approved plans for Mine #12 if they existed. Inspector McDaniel decided that if Shamrock had the plans, one hour was a reasonable time for the plans to be produced. Respondent's representative, Mr. Hacker, contacted Elmer "Rick" Couch, the Mine Superintendent. When Mr. Couch could not produce the plans for Mine #12, he told Inspector McDaniel, "they just messed up at the (Shamrock) main office by not submitting them" (Tr. 45). Based on a failure to abate the violation, Inspector McDaniel issued Order 3004643 at 11:45 a.m. on July 30, 1987, to stop coal production until all required preliminary plans were approved for Mine #12.

15. On July 31, 1987, MSHA approved the Mine #12 program for searching miners for smoking materials required by 30 C.F.R. 75.1721(b)(9). On August 3, 1987, MSHA approved the Mine #12 roof control and training plans required by 30 C.F.R. § 75.1721(b)(6) and (c)(1) and (2), respectively. These were the last of the plans required by 30 C.F.R. § 75.1721.

DISCUSSION WITH FURTHER FINDINGS

Citation 3004642

MSHA advised Respondent on many occasions before July 30, 1987, that it would have to have separate approved plans for Mines #11 and #12 before it could start developing their coalbeds, under 30 C.F.R. § 1721. On July 27, 1987, an MSHA inspector had issued a citation because Respondent was developing the coalbed at Mine #12 without approved plans for that mine. The inspector could have issued a follow-up § 104(b) withdrawal order on that date, but, instead, he terminated the citation based upon Respondent's representations that it was withdrawing the miners and would not resume development work until all the required plans were submitted and approved for Mine #12. Respondent did not

abide by that agreement, but later resumed mining without the approved plans.

The new violation was discovered on July 30, 1987, when another inspector found that Respondent was still mining without approved plans. He therefore issued the citation and order that are the subject of this proceeding.

I find that Respondent violated 30 C.F.R. § 1721(a) on July 30, 1987, as alleged in Citation 3004642, and that this violation was due to gross negligence on the part of the operator.

I also find that this violation was "significant and substantial" within the meaning of § 104 of the Act. The plans required by § 1721 are crucial to the safety and health protection of miners.

Considering all of the criteria for a civil penalty in § 110(i) of the Act, I assess a civil penalty of \$500 for the above violation.

Order 3004643

The Secretary charges a separate violation of § 75.1721(a) based upon Order 3004643, which alleges that "approved plans could not be provided at the mine site" (Jt. Exh. 4). That section does not state that the required plans must be available at the mine site. It does not imply such a duty with sufficient clarity to hold an operator liable for a civil penalty for a separate violation of § 1721(a). The focus of § 1721(a) is the duty to have "all preliminary plans . . . approved" before the operator begins to develop the coalbed. Although some of the plans may be required by other sections of Title 30, C.F.R., to be available at the mine, § 1721(a) does not in itself impose such a duty.

Order 3004643 therefore does not support a charge of violating § 1721(a) by failure to have the required plans available at the mine site. The order, nonetheless, is a valid exercise of the Secretary's authority under § 104(b) of the Act because the violation cited in Citation 3004642 had not been abated in the time allowed.

CONCLUSIONS OF LAW

The judge has jurisdiction over this proceeding.

Respondent violated 30 C.F.R. § 1721(a) as charged in Citation 3004642.

3. The allegation in Order 3004643 that "approved plans could not be provided at the mine site" does not state a violation of 30 C.F.R. § 1721(a), but the order is valid as an exercise of the Secretary's authority under § 104(b) of the Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation 3004642 and Order 3004643 are AFFIRMED.
2. Respondent shall pay a civil penalty of \$500 within 30 days of this Decision for the violation of 30 C.F.R. § 1721 (a) alleged in Citation 3004642 and found above.
3. The Secretary's petition for an additional civil penalty for a violation of 30 C.F.R. § 1721(a) based upon Order 3004643 is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Anne T. Knauff, Esq., Office of the Solicitor, U.S.
Department of Labor, 2002 Richard Jones Road, Suite B-201,
Nashville, TN 37215

Neville Smith, Esq., Smith & Smith, 110 Lawyer Street,
Manchester, KY 40962

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 17 1989

ROBERT YOUNG, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. YORK 88-9-DM
: MD 88-05
LEHIGH PORTLAND CEMENT :
COMPANY, : Cement Plant and Quarry
Respondent :
:

DECISION

Appearances: Dennis B. Schlenker, Esq., and Zachary Wellman, Esq., Albany, NY, for Complainant; Christopher S. Flanagan, Esq., for Respondent.

Before: Judge Fauver

This proceeding was brought by Robert Young under § 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, alleging a discriminatory discharge. Respondent contends Mr. Young was discharged for insubordination and not for any activity protected by § 105(c).

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact and additional findings in the Discussion that follows.

FINDINGS OF FACT

1. Based upon the parties' stipulated facts (Jt. Exh. 1), the following facts are incorporated as findings of fact:

a. Complainant, Robert Young, was hired by Lehigh Portland Cement Company on August 10, 1978, and discharged on October 2, 1987, by John Jones, Plant Manager of Lehigh Portland Cement Company's plant and quarry in Cementon, New York.

b. At the time of his discharge, Complainant was a yard foreman.

c. Complainant was directed by Ed Moran, his supervisor, to issue a verbal warning to B. Buley, brakeman, following a locomotive accident on September 29, 1987.

d. Complainant was also directed by John Jones to issue a verbal warning to B. Buley, arising from the same incident.

e. Complainant refused to issue a verbal warning to Mr. Buley despite the direction of Messrs. Moran and Jones.

f. Complainant's job responsibility included the supervision of those employees performing the tasks of locomotive operator and brakeman.

2. Respondent's letter of termination, October 2, 1987, from the plant manager, John J. Jones, to Complainant stated:

Your employment with Lehigh Portland Cement Company is terminated as of October 2, 1987 due to your insubordination when you refused to follow my specific instructions regarding an employee's disciplinary matter on September 30, 1987.

3. The employee disciplinary matter involved a railroad collision and derailment at Respondent's cement plant. A locomotive was pushing a string of cars when the cars collided with a line of standing railroad cars at a switching junction, resulting in a derailment and damage to two railroad cars. The cause of the accident was an error by the brakeman, Bruce Buley, who failed to position himself properly to observe the movement of the front of the train when he signaled the engineer to move the train forward.

4. Mr. Buley was near the mid-point of the train when he signaled the locomotive operator to move the train forward. He could not see the track ahead when he signaled the engineer, and he admitted to Mr. Jones that he did not position himself properly to observe the movement of the train, and that he had taken a short cut in performing his brakeman duties. Mr. Buley also acknowledged at the hearing that the purpose of walking the cars is to make sure they fit on the track and do not hit anything, and that had he followed the procedure of walking the cars, the collision and derailment would not have occurred.

5. By custom and practice, and the exercise of ordinary care, the brakeman is required to be in the lead car or alongside the front of the train when the train is being moved forward, so he can see the track ahead. After the

accident, Complainant orally reprimanded Mr. Buley because he had not been in the proper position to observe the movement of the train at the time of the accident.

6. Mr. Jones, the plant manager, personally investigated the train accident before he discharged the Complainant. He also consulted and sought the approval of his superior at corporate headquarters before discharging Complainant. The action of discharging a foreman for insubordination was not without precedent! Mr. Jones had terminated Andrew Jasiewski, process foreman, in 1985, for refusing to come to work in time to relieve another supervisor.

7. On September 30, 1987, ^{1/} Complainant was instructed by Ed Moran, his supervisor, to issue a verbal warning to B. Buley, brakeman, following the locomotive accident on the previous day. Mr. Jones also directed Complainant to issue a verbal warning to B. Buley on September 30, 1987.

8. A "verbal warning" as used by Respondent is an oral warning that is recorded in the employee's file. An example is the verbal warning given to Mr. Buley by supervisor Moran on September 30, 1987 (after Complainant refused to give such a warning), and entered in Mr. Buley's file as a "Record of Employee Verbal Warning" (Jt. Exh. 2). The verbal warning was for improper work performance, not misconduct, and cautioned Mr. Buley in the future to make sure that he walked the cars while moving trains in the yard. A verbal warning is not designed to be punitive, but is viewed by Respondent as a training tool, used to modify and correct improper work performance. The first official step of Respondent's progressive disciplinary program is a written warning. A verbal warning may support the later imposition of a written warning for a repetition of the original improper performance, but it is not intended to have any punitive impact per se.

9. Complainant refused to issue a verbal warning to Mr. Buley despite the direction of his supervisors Moran and Jones. Complainant's stated reasons for his refusal to issue a verbal warning to Mr. Buley were the absence of an established disciplinary policy for safety incidents and the

^{1/} The September 30 date corrects a conflicting date in the testimony of Mr. Jones and in Stipulated Facts #3 and #4 in Jt. Exh. 1. I find that a preponderance of the evidence shows the correct date was September 30, 1987.

fact that the employee or his union had previously requested a written job safety analysis for the brakeman position and it had not been made as of September 29, 1987.

DISCUSSION WITH FURTHER FINDINGS

In order to establish a prima facie case of discrimination under § 105(c)(1) ^{1/} of the Act, a miner has the burden of proving that (1) he engaged in a protected activity, and (2) an adverse action against him was motivated in any part by the protected activity. In order to rebut a prima facie case an operator must show that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activity and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof with regard to the affirmative defense; the ultimate burden of persuasion that discrimination has in fact occurred does not shift from the miner. Secretary on behalf of Robinette v. United Castle Co., 3 FMSHRC 803 (1981).

^{1/} Section 105(c)(1) provides: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluation and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act."

Complainant has failed to prove that he was engaged in a protected activity at the time of the Buley matter, or that his discharge was motivated in any part by an asserted prior protected activity.

Complainant was discharged on October 2, 1987, for insubordination relating to an employee disciplinary matter. Specifically, he was terminated because he refused to obey a directive of the plant manager to issue a verbal performance warning to an employee under his supervision, one Bruce Buley, following a locomotive accident.

The Buley disciplinary matter involved a railroad collision and derailment on September 29. After a thorough investigation of the matter, the plant manager, Jones, decided that Buley was at fault and directed Complainant to issue a verbal warning to Buley for improper job performance.

A verbal warning to Buley would not have involved a threat of danger to any one, including Complainant, or a violation of a safety or health standard. Complainant's refusal to comply with Mr. Jones' order was therefore not protected as a work refusal under § 105(c)(1).

Nor was Complainant's expression of concern about the fairness of a warning to Buley a protected activity under the Act. Complainant may have held sincere reservations about the fairness of a verbal warning to Buley, and for his own reasons he may have disagreed in good faith with Jones' judgment on the matter. However, disagreements of this kind are not protected by § 105(c) of the Act. The plant manager was justified in interpreting Complainant's refusal as an act of insubordination that warranted discharge. From his viewpoint, Complainant's refusal threatened to undermine management's decision to give safety direction and training to a brakeman who had just endangered a locomotive engineer, a trainee and himself and caused substantial property damage in an avoidable train collision and derailment. The facts do not point to a discriminatory motive. Indeed, the verbal warning Jones directed Complainant to give to Buley was essentially the same as the warning Complainant had already given to Buley. Complainant's opinion that, "I figured what I gave him [Buley] was enough - - sufficient telling him about what he should do" (Tr. 206), was simply Complainant's opinion that Jones' managerial decision was wrong. However, as stated, manager/subordinate disputes or disagreements of this kind are not protected activities under § 105(c)(1).

The prior request for a job safety analysis of the brakeman position does not support Complainant's claim of discrimination. It was well within Jones' authority as plant manager to order a verbal warning of Buley regardless of the status of a request for a job safety analysis of the brakeman job. Even if Buley had decided not to walk the cars because he perceived it dangerous to do so (and I do not find such a concern was his actual reason for staying at the midpoint of the train), he would not have been justified in playing "Russian Roulette" with the safety of the engineer and others by signaling the engineer to move the train forward when he (Buley) could not see the track ahead. Jones was therefore justified as plant manager in deciding to have Complainant issue a verbal warning to Buley. There has been no showing that Jones' decision and his enforcement of it were in any part motivated by discrimination against Complainant.

At the hearing Complainant testified that Jones and Moran did not give him a direct order to issue a verbal warning to Buley, and that, had he realized that they meant to give him such an order, he would have given the verbal warning to Buley in order to save his job. I do not find this testimony either convincing or relevant. First, it is contrary to the parties' stipulation that Moran and Jones directed Complainant to issue a verbal warning to Buley and he refused to do so. Also, Jones testified that he gave Complainant a direct order to issue a verbal warning to Buley and Complainant refused. I credit Jones' testimony on this point. Considering the record as a whole, I hold the parties bound by their factual stipulations. Secondly, even if Complainant interpreted Moran's and Jones' statements as mere opinions of management, and not orders, Complainant assumed the risk of miscalculating Jones' managerial intention. The risk was not insured by § 105(c) of the Act.

Complainant has not shown a nexus between his discharge and any protected activity before the Buley matter. His activities before September 29, 1987, were not shown to be particularly safety-active, and the reliable evidence does not show a prior safety complaint by Complainant that is any way connected with his discharge.

Finally, I accept management's evidence that Complainant was discharged solely because of his insubordination on September 30 1987.

CONCLUSIONS OF LAW

1. The judge has jurisdiction over this proceeding.
2. Complainant has failed to prove a violation of § 105(c)(1) of the Act.

ORDER

The Complaint is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Zachary Wellman, Esq., and Dennis B. Schlenker, Esq., Felt and Schlenker, 174 Washington Avenue, Albany, NY 12210 (Certified Mail)

Christopher S. Flanagan, Esq., Lehigh Portland Cement Company, P.O. Box 1882, 718 Hamilton Mall, Allentown, PA 18105-1882 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

APR 17 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 88-53
Petitioner	:	A. C. No. 40-02944-03513
V.	:	
	:	No. 7 Mine
B AND D COAL COMPANY,	:	
INCORPORATED,	:	
Respondent	:	
	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary; Bruce Anderson, Esq., McCampbell & Young, Knoxville, Tennessee, for the Respondent.

Before: Judge Weisberger

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Pursuant to Notice, this case was scheduled for hearing on March 29, 1989, in Knoxville, Tennessee. At the hearing, the Parties entered into settlement discussion and made a joint motion to approve settlement. A reduction in penalty from \$8,000 to \$4,000 is proposed. Based on the representation set forth in the stipulated facts filed on March 29, 1989, as well as the testimony and documentary evidence admitted on March 29, 1989, in support of the joint motion, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$4,000 within 30 days of this order.


Avram Weisberger
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Bruce Anderson, Esq., McCampbell & Young, 2021 Plaza Tower, P. O. Box 550, Knoxville, TN 37901-0550 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

APR 17 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 88-168
Petitioner	:	A.C. No. 05-03455-03557
	:	
v.	:	Docket No. WEST 88-193
	:	A.C. No. 05-03455-03558
ENERGY FUELS COAL, INC.,	:	
Respondent	:	Southfield Mine

DECISION

Appearances: S. Lorrie Ray, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Phillip D. Barber, Esq., Welborn, Dufford, Brown,
and Tooley, Denver, Colorado,
for Respondent.

Before: Judge Cetti

Statement of the Case

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (Mine-Act). The Secretary of Labor on behalf of the Mine Safety and Health Administration, charges the operator of the Southfield Mine, a coal mine located near Florence, Colorado, with violating certain mandatory safety standards set forth in Title 30 Code of Federal Regulations.

Respondent filed a timely answer contesting the existence of certain alleged violations, their characterization as "significant and substantial", and the amount of the proposed penalties.

After notice to the parties the matter was set for an evidentiary hearing on the merits at Denver, Colorado on March 16, 1989. When the matter was called for hearing the parties offered documentary evidence and made motions amending certain citations and proposed penalties and pleadings. After due consideration the motions were granted resolving all issues.

Docket No. WEST 88-168

Order/Citation No. 2839897

The Secretary moved to amend Order No. 2839897 from a 107(a) order to a 104(a) citation. The Citation alleges a violation of

30 C.F.R. § 75.604(b)(c) because three permanent splices in the trailing cable of the Joy shuttle car were improperly made. The Secretary's original \$400.00 proposed penalty was not modified. Respondent in turn moved to withdraw its notice of contest and agreed to pay the Secretary's original proposed \$400.00 civil penalty. There was no objection to either motion and the motions were granted resolving all issues with respect to this citation.

Citation No. 2839894

Citation No. 2839894 alleges a "significant and substantial" 104(a) violation of 30 C.F.R. § 75.1725(a). The citation alleges that the audible alarm provided for the Joy shuttle car was inoperative. The Secretary proposed a \$74.00 civil penalty. At the hearing no modification was proposed for the citation or the proposed penalty. Respondent moved to withdraw its notice of contest and agreed to pay the Secretary's original proposed civil penalty of \$74.00. There was no objection to the motion. The motion permitting respondent to withdraw its notice of contest to the citation and pay the original proposed penalty was granted.

Citation No. 2839895

Citation No. 2839895 alleges a "significant and substantial" 104(a) violation of 30 C.F.R. § 75.400. The citation alleges that oil, grease, and float coal dust was allowed to accumulate under the lids and in the pump compartments of the LEE NORSE Miner. The Secretary proposed a \$74.00 civil penalty. No change was proposed in the citation or the proposed penalty. Respondent moved to withdraw its notice of contest to the citation and the proposed civil penalty. There was no objection to the motion. The motion permitting respondent to withdraw its notice of contest and to pay the Secretary's original proposed penalty was granted.

Citation No. 2839896

Citation No. 2839896 alleges that two bushings on the shuttle car were not insulating the cable guide from the frame of the shuttle car. It was respondent's position that the bushings were in place, that the bushings did insulate the cable guide from the frame of the shuttle car and that there was no violation. The operator nevertheless did comply with the inspectors "gent call" and replaced the bushings. The Secretary moved to withdraw its notice of contest. There was no objection to the motion. The motion permitting respondent to withdraw its notice of contest and to pay the Secretary's original proposed civil penalty was granted resolving all issues with respect to this citation.

Docket No. WEST 88-193

Citation No. 2839893

Citation No. 2839893 alleges a 104(d)(1) violation of 30 C.F.R. § 75.400, in that float coal dust allegedly was allowed to accumulate. The operator did not dispute the occurrence of the violation but denied that it was aware of the existence of the condition which it promptly corrected as soon as the operator became aware of the condition. The inspector simply speculated that the operator was aware of the condition. The Secretary moved to amend the 104(d)(1) order to a 104(a) citation and accordingly modified the \$259.00 proposed penalty to \$150.00. There was no objection to the motion. The motion was granted. Respondent in turn withdrew its notice of contest to the citation and to the proposed penalty as amended.

The Secretary's counsel stated in support of its motion, that on review and preparation for the trial it was found that the negligence was less than "originally believed". Once the operator discovered the violative condition, it immediately took action to correct it. Although the operator admitted the violation, there was no evidence to support the issuance 104(d)(1) citation rather than a 104(a) citation.

Conclusion

After careful review and consideration of the pleadings, arguments, and the information placed upon the record at the hearing, I am satisfied that the proposed disposition made at the hearing is reasonable, appropriate and in the public interest. The civil penalties are appropriate under the criteria set forth in section 110(i) of the Mine Act.

DOCKET NO. WEST 88-168

Citation/Order No. 2839897 as modified to a 104(a) citation and the Secretary's original proposed civil penalty of \$400.00 are affirmed.

Citation No. 2839896 and its proposed civil penalty are vacated.

Citation Nos. 2839895 and 2839894 and the Secretary's original proposed civil penalty of \$74.00 for each of these violations are affirmed.

DOCKET NO. WEST 88-193

Citation No. 2839893 as modified to a 104(a) citation and its amended proposed civil penalty of \$150.00 are affirmed.

ORDER

The respondent, Energy Fuels Coal Inc., is directed to pay the civil penalties in the amounts shown above in satisfaction of the citations and orders in question within 30 days of the date of this decision and order.


August F. Cetti
Administrative Law Judge

Distribution:

S. Lorrie Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Phillip D. Barber, Esq., Welborn, Dufford, Brown and Tooley, 1700 Broadway, Suite 1100, Denver, CO 80290-1199 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER

ROOM 280, 1244 SPEER BOULEVARD

DENVER, CO 80204

APR 20 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-148-M
Petitioner	:	A.C. No. 23-01971-05502
	:	
v.	:	Maintenance Shop
	:	
MONITEAU COUNTY COMMISSION,	:	
Respondent	:	

DECISION

Appearances: John J. Matthew, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; John T. Kay, Esq., Prosecuting Attorney, Moniteau County, California, Missouri, for Respondent.

Before: Judge Lasher

This proceeding was initiated by the filing of a proposal for penalty by Petitioner MSHA pursuant to Section 110 of the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. Section 801 et seq. (1977)(herein the Act). Petitioner sought assessment of a penalty of \$20.00 for an alleged violation of 30 C.F.R. Section 50.30 described in Citation No. 3064674 issued on March 31, 1988 by MSHA Inspector Dulces N. Mesa as follows:

"The operator has failed to file with the appropriate MSHA office a quarterly mine employment report (Form 7000-2), after having been advised not to by their legal representative."

30 C.F.R. § 50.30(a) provides:

(a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in § 50.30-1 and submit the original to the MSHA Health and Safety Analysis Center, P.O. Box 25367, Denver Federal Center, Denver, Colo. 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal

Mine Health and Safety Subdistrict Offices. Each operator shall retain an operator's copy at the mine office nearest the mine for 5 years after the submission date.

The matter came on for hearing on February 16, 1989 in Sedalia, Missouri. Thereafter, by motion to dismiss dated April 14, 1989, the Secretary indicated its determination that Respondent Moniteau County Commission was operating a "borrow pit" rather than a mine covered under the Mine Act, that borrow pits are covered by OSHA except in certain circumstances not present here, that the Citation in question should be vacated, and these proceedings dismissed.

The motion to dismiss is for all intents and purposes a withdrawal by MSHA of its prosecution of this matter. Pursuant to Commission Rule 11 (29 C.F.R. 2700.11) a party may withdraw a pleading at any stage of a proceeding with the approval of the Commission or the Judge. In view thereof, and good cause appearing for the withdrawal of MSHA's proposal herein, the motion to dismiss is GRANTED, Citation No. 3064674 is VACATED, and this proceeding is DISMISSED.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

John T. Kay, Esq., 405 North High Street, California, MO 65018 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 21 1989

LOCAL UNION 9909, DISTRICT 31 : COMPENSATION PROCEEDING
UNITED MINE WORKERS OF :
AMERICA, : Docket No. WEVA 89-65-C
Complainants :
v. : Loveridge No. 22 Mine
:
CONSOLIDATION COAL COMPANY, :
Respondent :
:

ORDER OF DISMISSAL

Before: Judge Fauver

Pursuant to Complainant's request to withdraw its
complaint in the above case, motioned by the United Mine
Workers of America for the above case is DISMISSED.

William Fauver
William Fauver
Administrative Law Judge

Distribution:

Joyce A. Haula, Legal Assistant, UMWA, 900 15th Street, N.W.,
Washington, D.C. 20005 (Certified Mail)

Michael R. Peelish, Esq., Legal Department, Consolidation
Coal Company, 250 W. Main Street, P.O. Box 11430, Lexington,
KY 40575 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 24 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-106-M
Petitioner	:	A.C. No. 41-02775-05503
v.	:	
	:	Dudley's Pit Mine
LEBLANC'S CONCRETE & MORTAR	:	
SAND COMPANY,	:	
Respondent	:	

DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner; Dudley J. LeBlanc, Owner, LeBlanc's Concrete & Mortar Sand Company, Rosenberg, Texas, Pro Se, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for 10 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed a timely answer and notice of contest, and a hearing was held in Houston, Texas. The parties waived the filing of posthearing briefs, but I have considered all of their oral arguments made on the record during the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalties to be assessed for the violations,

taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether several of the violations were in fact "significant and substantial."

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977; Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Part 56, Title 30, Code of Federal Regulations.
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated in pertinent part to the following (Exhibit ALJ-1):

1. The name of the respondent company is LeBlanc's Concrete & Mortar Sand Company with a place of business near Rosenberg, Texas.
2. Jurisdiction is conferred upon the Federal Mine Safety and Health Review Commission under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. The alleged violations took place in or involve a mine that has products which affect commerce.
3. The name of the mine is Dudley's Pit, identification number 41-02775. The mine is located near Richmond, Texas in Fort Bend County. The size of the company and mine is 7,480 production tons or hours worked per year.
4. The imposition of any penalty in this case will not affect the respondent's ability to continue in business.
5. The total number of assessed violations (including single penalties timely paid) in the preceding twenty-four months
6. On March 1, 1988, an inspection was conducted by James S. Smiser and Jo Watson (also known as Jim Watson) a

representatives of the Mine Safety and Health Administration.

7. Ten Section 104(a) citations (numbers 03061705 through 03061714) were issued for violations of 30 C.F.R. § 56.14006, 56.14001, 56.15020, 56.14001, 56.4102, 56.4230(a)(1), 56.46001, 56.14001, and 56.4100(b) respectively, on March 1, 1988.

8. All of the citations were abated within twenty-four (24) hours by the respondent.

Discussion

When the hearing convened, the parties advised me that the respondent wished to withdraw its contests with respect to Citation Nos. 3061705 and 3061708 (photographic exhibits P-4 and P-1). The respondent agreed to pay the full amount of the proposed civil penalty assessments for the violations, and after considering the request to withdraw the contests as a proposed settlement pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, the request was granted and the settlement was approved from the bench. My decision in this regard is herein reaffirmed, and the citations are affirmed as issued.

The remaining citations in issue in this proceeding are as follows:

Section 104(a) "S&S" Citation No. 3061706, cites a violation of 30 C.F.R. § 56.14001, and the condition or practice states as follows:

The guard covering main drive shaft and couplers on dredge was broken, parts removed, and loose, exposing employee to moving machine parts, a fall into dredge sump, and a potential of being drown (sic) in water/oil being held in bottom of dredge.

Section 104(a) "S&S" Citation No. 3061707, cites a violation of 30 C.F.R. § 56.15020, and the condition or practice states as follows:

The dredge operator did not wear a life jacket on dredge while on deck and where there is a danger from falling into water, the dredge deck is not protected by handrails.

Section 104(a) "S&S" Citation No. 3061709, cites a violation of 30 C.F.R. § 56.4102, and the condition or practice states as follows:

The flammable or combustible liquid spillage and leakage was not removed in a timely manner or controlled to prevent a fire hazard on the dredge. The sump of dredge contained a large amount of oil, diesel fuel, and water floating under engine, pump, and other equipment which could be ignited to produce a flash fire and expose operator to fire hazard.

Section 104(a)"S&S" Citation No. 3061710, cites a violation of 30 C.F.R. § 56.4230(a)(1), and the cited condition or practice states as follows:

A fire extinguisher was not provided on the dredge where a fire or its effects could impede escape from self-propelled equipment. Operator is exposed to fire hazard from diesel fuel, oils, and grease used on dredge motor.

Section 104(a) "S&S" Citation No. 3061711, cites a violation of 30 C.F.R. § 56.4600(a)(1), and the cited condition or practice states as follows:

A fire extinguisher was not provided in the welding area of shop where electric arc and cutting torch were in use. Electrical circuits are also in area which could produce a hazard by the use of a electrical conductive extinguishing agent. A multi-purpose dry chemical fire extinguisher or other type with at least a 2-A; 10 B:C rating shall be used. Combustibles are stored in area of shop which could be ignited by welding activity.

Section 104(a) non—"S&S" Citation No. 3061713, cites a violation of 30 C.F.R. § 56.14001, and the cited condition or practice states as follows:

The V-belt drive of floating fresh water pump was not provided with a guard to protect ingoing pinch points. Gravity reduced due to location of pump.

Section 104(a) non-"S&S" Citation No. 3061712, cites a violation of 30 C.F.R. § 56.14001, and the cited condition or practice states as follows:

The V-belt drive on shop air compressor was not provided with a guard to protect employees from ingoing pinch points. Gravity is reduced due to location of drive.

Section 104(a) "S&S" Citation No. 3061714, cites a violation of 30 C.F.R. § 56.4100(b), and the cited condition or practice states as follows:

Welding, which produces open flame and sparks, was in area of shop which also had bulk oils stored with open caps and hand pumps. Employee was exposed to fire hazard. Gravity is increased due to lack of a fire extinguisher being available at area.

Petitioner's Testimony and Evidence

MSHA Inspector James R. Smiser, testified as to his experience and training, and he confirmed that he conducted an inspection at the respondent's mining operation on March 1, 1988, and issued the citations which are in issue in this proceeding.

Citation No. 3061706

Inspector Smiser stated that he issued this citation after observing that the mesh grating guard used to guard the main drive shaft and coupler on the dredge was loose and unsecured. If one were to step on the grating, it would give and go down under the weight of anyone walking on it. Mr. Smiser identified exhibit P-2 as a photograph of the mesh guard in question.

Mr. Smiser confirmed that he made a gravity finding of "highly likely," and he did so because the dredge deck was wet and coated with oil, making it slippery, and he believed that if anyone stepped on the grating it would give way and expose the individual to the hazard of falling into the exposed moving drive shaft and coupler.

Mr. Smiser confirmed that he made a negligence finding of "moderate" because the dredge operator was required to be on the dredge, and he should have been aware of the readily observable condition of the loose grating.

On cross-examination, Mr. Smiser confirmed that when he stepped on the loose grating guard, it gave some, but did not touch the coupler. He also confirmed that he had no knowledge that the grating had been in that condition for 2 years, and that his inspection was the first time he had observed the condition. He stated that he discussed the condition with superintendent Jim Davis, and agreed that the loose grating was probably caused by fatigue resulting from a broken angle iron which helped support the grating.

Citation No.3061707

Inspector Smiser confirmed that he issued the citation after observing that the dredge operator was not wearing a life jacket while the dredge was in operation. He stated that the dredge operator walked around the dredge while inspecting the equipment, and at the time of the inspection the dredge deck was wet and slippery due to the presence of water and oil, and the dredge perimeter was not equipped with handrails. Under these circumstances, he concluded that the violation was "significant and substantial" because it was reasonable likely that the dredge operator could drown if he slipped and fell off the barge without a life jacket.

Mr. Smiser confirmed that he made a negligence finding of "moderate" because the respondent had been in the dredging business for years and should have been aware of the requirement for the wearing of a life jacket.

Mr. Smiser stated that he spoke with superintendent Jim Davis who advised him that life jackets are made available to the dredge operator and that the operator apparently chose not to take one with him or to wear it at the time of the inspection.

On cross-examination, Mr. Smiser stated that he did not know the dimensions of the dredge and made no measurements. He described the pilot house where the dredge operator is stationed when he operates the dredge, and estimated that it was 5 feet wide. He confirmed that he observed no life jacket on the dredge, and that Mr. Davis obtained one after the inspection and provided it to the dredge operator. Mr. Smiser identified photographic exhibit P-3(a) as the dredge in question, and he estimated that it was anchored approximately 100 to 150 yards off shore, but he did not know the depth of the water at that location. He also identified photographic exhibit P-3(b) as a photograph of a portion of the edge of the dredge deck where no handrails were installed.

Mr. Smiser stated that if the water was "knee deep," he would still require the dredge operator to wear a life jacket because if he slipped or fell overboard and struck his head, he would still be exposed to a drowning hazard if he was not wearing a life jacket.

Mr. Smiser stated that in accordance with MSHA's policy, if the dredge were equipped with protective hand-rails, a life jacket would not be required. He confirmed that there is no mandatory standard requiring hand-rails on a dredge, and that in the absence of hand-rails, there is a presumption that a dredge operator without a life jacket would be exposed to the hazard of falling overboard at any given time while walking around the dredge performing his duties.

Mr. Smiser confirmed that he spoke with the dredge operator and asked him why he was not wearing a life jacket, but received no response or explanation.

Citation No. 3061709

Mr. Smiser stated that he issued the citation after observing an accumulation of combustible and flammable oil and diesel fuel below the dredge engine and sump pump. The liquid had spilled or leaked from the engine or sump and it was mixed with water and was floating on the surface beneath the engine. He identified the material as the "shiny" material shown behind the batteries and below the engine in photographic exhibit P-5.

Mr. Smiser confirmed that he made a gravity finding of "reasonably likely," and considered the violation as significant and substantial because the combustible materials could have been ignited and caused a "flash fire" from the heat of the engine. Although the operator's compartment was located 15 to 20 feet from the sump and engine area, the absence of a life jacket and a fire extinguisher on the dredge, and the fact that diesel fuel was stored on the dredge, added to the hazard in that in the event of a fire, the dredge operator would be unable to safely remove himself from the dredge and could suffer fatal injuries.

Mr. Smiser confirmed that he made a negligence finding of "moderate" because the leakage or spillage was readily observable and the respondent should have been aware of the requirement to timely remove the accumulated materials.

On cross-examination, Mr. Smiser stated that he did not measure the accumulations, but estimated they were 6 to 8 inches deep. He confirmed that he had no knowledge of the "flash point" of the accumulated oil or fuel, and did not know how much heat was generated by the engine, or how hot it had to be in order to ignite the materials or cause a flash fire. He assumed that oil and fuel, by their-nature, are combustible and flammable.

Mr. Smiser stated that the sump is located approximately 12 to 15 inches below the deck level of the dredge, and he had no knowledge of the size and type of the dredge engine.

Citation No. 3061710

Mr. Smiser confirmed that he issued the citation after finding that no fire extinguisher was provided for the dredge which was the subject of the previous citations. Given the potential fire hazard presented by the accumulation of combustible fuel and oil at the dredge engine and sump area, as described with respect to Citation No. 3061709, and the fuel stored on board, he believed that it was reasonable likely that a fire would occur, and if it did, the absence of a fire extinguisher would not provide a means for extinguishing the fire, and the lack of a life jacket for use by the dredge operator would have impeded his escape from the hazard. Mr. Smiser confirmed that he considered the dredge to be self-propelled equipment for which a fire extinguisher was required. Under these circumstances, he concluded that the violation was significant and substantial.

Mr. Smiser confirmed that he made a negligence finding of "moderate" and that he did so because superintendent Davis advised him that a fire extinguisher had previously been provided for the dredge, and that one was obtained and provided by Mr. Davis after the inspection. Under these circumstances, Mr. Smiser concluded that the respondent was aware of the requirement for a fire extinguisher and that it knew or should have known about the requirement.

On cross-examination, Mr. Smiser confirmed that he and Mr. Davis were transported to the dredge by a small boat, but he had no knowledge as to whether another boat or barge used to transport fuel and the dredge operator to the dredge was also tied up and available for the dredge operator at the time of the inspection. Mr. Smiser stated further that the pilot house containing the dredge controls had one door.

Citation No. 3061711

Mr. Smiser confirmed that he issued the citation after he found that a multipurpose dry chemical fire extinguisher was not provided at the shop area where electrical welding work was being performed on a dredging bucket. He stated that fluids and oils were being used and stored in the shop, and he observed three or four 55-gallon drums of oil stored in one corner of the shop, and one of the drums was equipped with a hand pump. He estimated that these drums were located approximately 8 to 10 feet from where the welding or cutting was taken place.

Mr. Smiser confirmed that he made a gravity finding of "moderate" and considered the violation to be significant and substantial because it was reasonably likely that an "air arc" generated by the type of work going on could spray small pieces of hot metal in the shop and ignite the oil and other fluids which were present in the shop. However, he believed that in the event of a fire, the workers in the shop area could quickly exit the shop.

Mr. Smiser confirmed that he made a negligence finding of "moderate" because he believed that the respondent knew or should have known about the requirement for a fire extinguisher in the shop.

On cross-examination, Mr. Smiser stated that he had no knowledge of the size of the shop, but estimated that it was approximately 100 x 200 feet, and he characterized it as "pretty good size," with an open entrance.

Mr. Smiser confirmed that the welding truck was parked inside the shop, and the actual welding work was taking place outside the shop entrance immediately below the shop roof-line and approximately 4 to 5 feet outside of the shop.

Mr. Smiser stated that he could not recall the precise cutting or welding process which was taking place, but believed that it was an "air-arc" cutting apparatus which used compressed air. He did not believe that an open flame process which utilizes acetylene gas or oxygen, or electric welding, was being used, but confirmed that both of these processes were available for use. He confirmed that the bucket in question was on the ground.

Mr. Smiser confirmed that the cited standard, section 56.4600(a)(1), requires that a multipurpose dry chemical fire extinguisher be available when electrical arc or open flame

welding or cutting work is being performed, and that the intent of the standard is to insure that an appropriate fire extinguisher be available in the event the kind of welding taking place creates an electrical hazard.

Citation No. 3061712

Mr. Smiser confirmed that he issued the citation after finding that the V-belt drive on a compressor located in the shop was not guarded. He stated that employees had access to the area where the compressor was located, and that tools and other materials were located and stored in the area.

Mr. Smiser described the compressor as a "large tank" located in the corner of the shop, and he stated that the unguarded belt was mounted on top of the compressor approximately 5 to 5-1/2 feet above the shop floor, and that it was to the rear of the compressor facing the outside shop wall.

Mr. Smiser stated that he made a gravity finding of "unlikely" and did not consider the violation to be significant and substantial because he believed it was unlikely that an injury would occur due to the location of the unguarded belt. He did not believe it was likely that an employee would get caught in the unguarded belt and suffer an injury. He confirmed that the respondent's negligence was low because it was probably not aware that the belt was required to be guarded.

On cross-examination, Mr. Smiser stated that if someone deliberately wanted to get into the unguarded belt, they could do so by reaching behind the compressor. He also believed that someone could contact the unguarded belt through inattention, but conceded that there was a "slim chance" of anyone contacting the belt.

Mr. Smiser stated that he did not believe that the cited belt in question was guarded "by location," and that MSHA's informal policy recognizes "guarding by violation" only in instances where unguarded pinch points are located 7 feet off the ground.

Citation No. 3061713

Inspector Smiser confirmed that he issued the citation after finding that the V-belt drive on the fresh water floating pump motor was not provided with a guard to protect the exposed pinch points. He identified photographic exhibit P-9 as a photograph of the pump in question. He confirmed that he made a gravity finding of "unlikely" and did not consider the violation to be significant and substantial because it was

unlikely that an employee would be at the pump location when it was started up or in operation. Due to the location of the pump, and the fact that the motor was activated from the plant, he did not believe that it was likely that an employee would be exposed to a hazard.

On cross-examination, Mr. Smiser stated that the cited mandatory standard, section 56.14001, requires that a belt drive "which may be contacted" be guarded. He confirmed that Mr. Davis advised him that under normal operating circumstances, no one would be on the pump barge.

Citation No. 3061714

Mr. Smiser confirmed that he issued the citation because the welding taking place in the shop area as previously described with respect to Citation No. 3061711 was taking place at the shop area where flammable or combustible oils and fluids were stored or handled. Mr. Smiser confirmed that while both citations were issued for the same welding or cutting work which was being performed on the bucket outside the shop, Citation No. 3061714, was issued for performing welding work in an area where open flame welding was taking place in an area where combustible or flammable oils and fluids were stored. Performing such work in such an area is prohibited by the standard.

Mr. Smiser stated that the coil welding which was taking place produces open flame sparks, and he determined that an injury was reasonably likely in that in the event of a fire someone would probably suffer minor burns. For these reasons, he determined that the violation was significant and substantial.

Mr. Smiser confirmed that he made a finding of "low" negligence, and that he did so because Mr. Davis advised him that he was in the process of moving the stored materials to another location.

Respondent's Testimony and Evidence

Dudley J. LeBlanc, respondent's owner, testified that his concrete and sand dredging operation is a very small business, and that he employs four individuals at his operation. One person operates the dredge, one operates the plant, one operates the loaders which load the trucks, and one person works in the office. He further stated that he is open for business 5 days a week, from 7:00 a.m. to 5:00 p.m.

Citation No. 3061706

Mr. LeBlanc conceded that the metal grating provided to guard the dredge drive shaft and couplers was loose and in need of repair because of a broken angle iron support. However, he pointed out that most of the drive shaft was located under the grating which was firmly in place as shown by photographic exhibit P-2. He also stated that the machine gear box which is shown in the photograph is normally in that raised position. Although the guarding was loose, Mr. LeBlanc stated that one could walk on it and it would not give or contact the drive shaft or coupler.

Citation No. 3061707

Mr. LeBlanc stated that he has instructed the dredge operator to wear a life jacket while working on the dredge, and that he is provided with a jacket. Although he was not present during the inspection, Mr. LeBlanc believed that a life jacket was provided and located in the pilot house located at the end of the dredge. After viewing photographic exhibit P-3(a), Mr. LeBlanc estimated that the dredge was located 10 to 15 feet from the bank, and was in 4 or 5 feet deep water on the day of the inspection. However, he confirmed that during any given day, the dredge moves from one location to another during the dredging and pumping operation, and that it does operate in water which is 30 feet deep.

Mr. LeBlanc stated that the dredge was 16 feet wide and 24 feet long, with two 4 x 20 foot floats. The dredge contains a pilot house, an 8 x 10 foot pump, four winches, and a Detroit engine and hydraulic pump. Diesel fuel is used to drive the dredge, and there is a 900 gallon fuel tank at the rear of the dredge.

Citation No. 3061709

Mr. LeBlanc stated that the engine and sump leakage in question was not unusual in that the packing around the sump drive shaft causes leakage. He confirmed that the spillage and leakage cannot be emptied into the water, and that it is periodically removed and taken ashore. He has now devised a method to automatically pump out the spillage and remove it from the dredge.

Mr. LeBlanc stated that while diesel fuel is combustible, its ignition point is so high that one could throw a lighted match on the materials and it will not ignite. He confirmed that the dredge operator is permitted to smoke while in the

pilot house, and that a water can is available in the house for cigarette butts. The operator is not permitted to smoke while working on the dredge outside of the pilot house.

Citation No. 3061710

Mr. LeBlanc confirmed that since he was not on the dredge during the inspection, he did not know whether a fire extinguisher was aboard. He stated that an 8 x 20 foot small barge used for transporting fuel is always tied up at the dredge, and it can be used by the dredge operator in an emergency. He stated that the pilot house has two doors, and it contains the dredge controls and radio and communications equipment.

Citation No. 3061711

Mr. LeBlanc confirmed that he was not present during the inspection and has no knowledge as to whether a fire extinguisher was provided for the shop area. However, he did observe a C.O. five extinguisher in the shop in the evening after the inspection. He confirmed that the welding operation was taking place outside of the shop and that the bucket which was being serviced was on the ground. Since it was on the ground, he did not believe that any sparks or arcs would reach the oil stored inside the shop. In the event welding was taking place above the stored oil drums, he would concede that arcs and sparks could fall below and onto the oil drums, but since this was not the case, he did not believe that any hazard was present.

Citation No. 3061712

Mr. LeBlanc stated that the cited unguarded compressor belt was at approximate "eye-level" and that the compressor was mounted on 4 x 4 blocks in the corner of the shop. He stated that in order to change out the belt located at the rear of the compressor, one would have to physically move the compressor in order to gain access to the belt. He stated that he abated the citation by installing a bar across the compressor to provide a physical barrier, and that the V-belt itself was not required to be guarded.

Citation No. 3061713

Mr. LeBlanc stated that under normal operating procedures, no one is required to be on the barge on which the fresh water pump was located. The pump motor is activated from shore in the plant by means of a switch located 200 to 300 feet from the barge, and that any engine priming is done from the shore some

20 to 30 feet away. He stated that the pump is located on a 6 x 6 foot barge which rests on floats, and that no one is permitted to be on the barge while the pump is in operation. He confirmed that someone is on the barge only once a week for service before dredging is started, but that all of the electricity is deenergized and the pump is shut down. When major repairs are required, the pump is physically lifted ashore by means of a cherry picker.

Citation No. 3061714

Mr. LeBlanc confirmed that the welding work in question was taking place outside of the shop at the same location and on the same piece of equipment where Citation No. 3061711 was issued. He conceded that the work was being performed with an acetylene oxygen cutting torch which produced an open flame, and although he had available a "plasma cutter that you cut with electricity," it was inoperative.

Findings and Conclusions

Fact of Violations

Citation No. 3061706, 30 C.F.R. § 56.14001

The inspector issued the citation after finding that the wire mesh grating guard used to guard the dredge drive shaft and coupler was loose and unsecured. The inspector confirmed that the respondent's superintendent agreed that the grating was loose because of fatigue resulting from a broken angle iron used to support the guard, and Mr. LeBlanc conceded that this was the case and that the guard was in need of repair. Although Mr. LeBlanc believed that most of the drive shaft was protected and disagreed with the inspector's belief that the grating would give and move down if someone were to walk on it, the fact remains that the guard was not securely in place, and I believe one can reasonably conclude that through fatigue and wear, it would have come completely loose over time and exposed one to a hazard of falling into the moving drive shaft and coupler. I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 3061707, 30 C.F.R. § 56.15020

The evidence establishes that the dredge operator was not wearing a life jacket while the dredge was in operation and while he was walking around a slippery deck performing his duties. The dredge was not provided with any protective handrails around its perimeter, and in the event the operator

fell into the water, which I believe was reasonably likely given the slippery deck conditions, he could possibly drown. Although Mr. LeBlanc stated that the dredge was located in 4 or 5 feet of water, he confirmed that on any given day the dredge moves around and sometimes operates in water 30 feet deep. Although the respondent's evidence indicates that a life jacket may have been provided for the dredge operator's use, the fact remains that he was not wearing it. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 3061709, 30 C.F.R. § 56.4102

The inspector issued the citation after observing a combination of oil, diesel fuel, and water floating under the dredge sump pump and engine located approximately 12 to 15 inches below the deck level of the dredge. The inspector did not measure the accumulated materials, but estimated they were 6 to 8 inches deep. The cited section 56.4102, provides that "flammable or combustible liquid spillage shall be removed in a timely manner or controlled to prevent a fire hazard."

30 C.F.R. § 56.2 defines the term "combustible" as "capable of being ignited and consumed by fire." The term "flammable" is defined as "capable of being easily ignited and of burning rapidly." The term "Flash Point" is defined as "the minimum temperature at which sufficient vapor is released by a liquid or solid to form a flammable vapor-air mixture at atmospheric pressure."

Mr. LeBlanc testified that due to the packing around the shell of the water pump, it is impossible to prevent water from leaking and mixing with oil and hydraulic fluid which may be present when the hoses break. He confirmed that any such spillage is periodically cleaned up and contained within the dredge, and then taken to shore and disposed of. Although he conceded that the material may be considered combustible, he stated that the ignition point is so high that it would not burn even if one were to throw a lighted match on it. Mr. LeBlanc's testimony in this regard is unrebutted.

The evidence here establishes that the accumulated materials were a mixture of water, which one may reasonably assume was leaking from the water pump, and oil and diesel fuel. Section 56.4102, requires the removal or control of "flammable or combustible" spillage. In my view, in order to establish a violation, a determination must be made by the inspector as to whether the accumulations he observed were in fact combustible or flammable. Given the mixture of water

which was present, and Mr. LeBlanc's unrebutted testimony with respect to the absence of an ignition point high enough to ignite the materials in question, I cannot conclude that the petitioner has presented any credible probative evidence to establish the combustibility or flammability of the materials cited by the inspector. Although the inspector was of the opinion that a "flash fire" could have resulted from the heat generated by the engine, he conceded that he had no knowledge as to the flash point of the accumulated oil and fuel, how much heat was generated by the engine, or whether the engine was hot enough to generate a flash fire. Under the circumstances, I conclude and find that the petitioner has failed to establish that the accumulated materials were in fact combustible or flammable. Accordingly, I conclude and find that a violation has not been established, and the citation IS VACATED.

Citation No. 3061710, 30 C.F.R. § 56.4230(a)(1)

The inspector issued the citation after finding that a fire extinguisher was not provided for the self-propelled dredge. The cited section 56.4230(a)(1), provides that "whenever a fire or its effects could impede escape from self-propelled equipment, a fire extinguisher shall be on the equipment."

The inspector believed that an accumulation of fuel and oil at the sump pump area presented a potential fire hazard, and that in the event of a fire, and in the absence of a fire extinguisher, there would be no available means to fight the fire. The accumulations noted by the inspector were the same accumulations previously cited in Citation No. 3061709. That citation was vacated for a lack of any credible evidence to establish that the accumulations were combustible or flammable.

I find no problem with a safety standard which directly and clearly requires that a fire extinguisher be available on a dredge in the event of a fire. However, I do have a problem with the language of the particular standard cited in this instance. The standard requires a fire extinguisher only if it can be shown that "a fire or its effects" could impede an escape from self-propelled equipment. I find no evidence in this case to establish that any fire or its effects could have impeded the escape of the dredge operator from the dredge. Although the absence of a life jacket may have effectively impeded his escape, the respondent here has already been charged with a violation for the failure of the dredge operator to wear a life jacket. The intent of the standard is fire protection, and it is not a life jacket requirement.

On the facts of this case, the dredge was located 10 to 15 feet from shore in water 4 to 5 feet deep, and Mr. LeBlanc's unrebutted credible testimony reflects that a small barge is always tied up to the dredge for use in any emergency. In the event of any fire, the dredge operator could readily jump overboard, or use the barge as a means of leaving the dredge. Under all of these circumstances, including the lack of any evidence to establish that a fire, or its effects, would have impeded the escape of the dredge operator, I conclude and find a violation has not been established. Accordingly, the citation IS VACATED.

Citation No. 3061711, 30 C.F.R. § 56.4600(a)(1)

In this instance, the respondent is charged with an alleged violation of mandatory standard 30 C.F.R. § 56.4600(a)(1), which provides as follows:

Extinguishing Equipment.

(a) When welding, cutting, soldering, thawing, or bending--

(1) With an electric arc or with an open flame where an electrically conductive extinguishing agent could create an electrical hazard, a multipurpose dry-chemical extinguisher or other extinguisher with at least a 2-A:10-B:C rating shall be at the worksite.

The inspector confirmed that he issued the citation because a multi-purpose dry chemical fire extinguisher was not provided at the location where welding work was being performed on a dredging bucket outside of the shop. The citation states that an electric arc and cutting torch were in use during the welding process, that electrical circuits were present, and that these circuits could produce a hazard by the use of an electrically conductive extinguishing agent.

The inspector testified that electrical welding work was being performed on the bucket in question, and that he was concerned that an "air arc" generated by the type of welding work taking place could have sprayed small pieces of hot metal into the shop and ignited some oil and other fluids which were stored in drums inside the shop. In short, the testimony of the inspector reflects that he was concerned about a fire hazard, rather than an electrical hazard. Although the citation alluded to the presence of certain electrical circuits,

the inspector's testimony is devoid of any reference to any such electrical circuits or electrical hazards.

In my view, the intent of the standard is to preclude the use of an extinguishing agent or apparatus capable of conducting electricity, thereby introducing an electrical hazard if the proper type of extinguisher is not available when work is being performed with an electric arc or open flame. As an example, the inspector stated that if a water fire extinguisher were being used, it could create an electrical hazard (Tr. 60).

The inspector testified that electrical welding was taking place, and that the work included the use of an "air arc process" which is a cutting method that uses compressed air to remove molten metal. He confirmed that he could not recall whether an electric or gas process was being used, nor could he recall whether an electrical welding device or a torch open flame device using oxygen acetylene or propane was being used. In any event, he confirmed that the term "air arc" could apply to either a torch welding system or an electric system, and that the respondent was using one or the other, and no other type of system (Tr. 59).

Mr. LeBlanc confirmed that he was not present during the inspection and he had no knowledge as to whether or not any fire extinguisher was provided at the location where the welding work in question was being performed. He conceded that the work was being performed with an acetylene cutting torch which produced an open flame.

On the facts presented here, although the inspector could not recall which of the two welding systems were being used (electric arc or open flame), Mr. LeBlanc confirmed that it was the latter. The inspector's credible testimony establishes that no fire extinguishing agent or device was available at the location where the work was being performed. Although one may argue that in the absence of any fire extinguisher, an electrically conductive extinguishing agent was not present to create an electrical hazard, my construction of the intent of the standard leads me to conclude and find that a multipurpose dry-chemical extinguisher was required to be available at the work location in question. Since it was not, I further conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 3061712, 30 C.F.R. § 56.14001

The evidence establishes that the compressor drive unit was not guarded to prevent contact with an exposed moving

machine part. Although the evidence establishes that the unguarded unit was facing the wall, and that it had to be moved in order for one to gain access to it, I cannot conclude that it was "guarded by location." The inspector stated that the unguarded drive was approximately 5 to 5-1/2 feet above ground level, and Mr. LeBlanc confirmed that it was at "eye level." The inspector also testified that the compressor was located in a shop area where tools and other materials were located and stored, and that employees had ready access to the area. Although the inspector agreed that it was unlikely that anyone would get caught in the unguarded drive unit and suffer an injury, the intent of the guarding standard is to preclude the possibility of anyone contacting an exposed and unguarded pinch-point through inattention, inadvertence, or ordinary human carelessness. See: Secretary of Labor v. Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094 (September 1984). I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 3061713, 30 C.F.R. § 56.14001

The inspector issued the citation after finding that a belt drive unit on a floating fresh water pump was not guarded over its "ingoing pinch points." The pump was installed on a 6 x 6 foot barge which is supported by floats, and it was located on the water 20 x 30 feet off shore (photographic exhibit P-9). The inspector believed that it would be unlikely that anyone would be on the barge when the pump was started from the plant, and due to the location of the pump, he did not believe that it was likely that anyone would be exposed to a hazard. Mr. LeBlanc's unrebutted credible testimony reflects that the pump motor is activated by means of a switch located in the plant which was located some 200 to 300 feet from the barge, and that any priming of the pump is done from shore. Mr. LeBlanc confirmed that no one is required to be on the barge during the normal operation of the pump, and that although someone may be on the barge once a week for service before any dredging is begun, the pump is deenergized and shut down, and if any major repairs to the pump are required, the pump is lifted out of the water with a cherry picker and taken ashore for repairs.

I find no evidence to support any reasonable conclusion that there existed a reasonable possibility of anyone contacting the unguarded pump belt drive unit in question, and the petitioner has presented no evidence to establish that anyone would ever be near the belt drive while the pump was in operation. Under the circumstances, I conclude and find that a

violation has not been established, and the citation IS VACATED.

Citation No. 3061714, 30 C.F.R. § 56.4100(b)

The inspector issued the citation because of the presence of oils and fluids in the shop area where welding was taking place. Section 56.4100(b), prohibits the use of an open flame where flammable combustible liquids, including greases, are stored or handled. The inspector testified that he observed several 55 gallon drums of oil, one of which had a hand pump for dispensing the oil, and three or four drums of petroleum fuel. The inspector confirmed that the superintendent advised him that a new storage area was being prepared to store the drums of oil and fluids in question.

The evidence establishes that the oil and fluid drums in question were stored inside the shop area in one corner, and that the welding work in progress was taking place outside of the shop. The inspector had no knowledge as to the types of fluids or oils which were in the drums, and he presented no credible testimony or evidence to establish that the oils and fluids were in fact combustible or flammable. He confirmed that section 56.4100 does not establish any particular distance parameters requiring the separation of stored flammable and combustible materials from open flames, and assumed that the use of an open flame in the same building where such materials are stored would be prohibited, unless there was an appropriate distance between the two or a partition isolating the materials from an open flame. He conceded that in this case, he simply concluded that the materials and open flame welding were in "close enough proximity" to present a hazard (Tr. 79-80).

In this case, the evidence establishes that the oil and fuel drums were stored inside the shop approximately 8 to 10 feet away from where the welding was taking place (Tr. 52). The shop was approximately 100 x 200 feet, with an opening in the front of approximately 50 to 75 feet. The dredge bucket which was being worked on was located outside of the shop on the ground some 4 to 5 feet beyond the roofline of the shop (Tr. 56). Thus, the drums in question were stored inside the shop approximately 12 to 15 feet from where the dredge bucket was located outside of the shop. Under these circumstances, I conclude and find that there was an adequate physical separation between the outside shop area where the work was being done and the area inside the shop where the drums which were not proven to contain combustible or flammable materials were stored, and that the work location was not, by any reasonable interpretation, a location where flammable or combustible

liquids were stored. Accordingly, I further conclude and find that a violation has not been established, and the citation IS VACATED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company,

Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Citation No. 3061706

I conclude and find that the loose and broken wire mesh guard over the engine drive shaft and couplers constituted a significant and substantial violation. The location of the engine was such that it was readily available to anyone stepping across from one side of the dredge to the other, and given the fact that the angle iron guard support had broken through fatigue, I believe that over time, as more strain was placed on the mesh guarding by anyone stepping or walking on it, it would be reasonably likely that the guarding would have given way. If this had occurred while someone was stepping over it or walking on it, he could have fallen into the moving drive shaft and couplers and suffered injuries of a reasonably serious nature. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

I take note of the fact that although the citation issued by Inspector Smiser makes reference to a potential drowning if someone were to fall into the water and oil held in the bottom of the dredge, no testimony was forthcoming from the inspector with regard to this alleged hazardous condition, and my findings and conclusions are limited to the question of possible contact with moving machine parts because of the loose and unsecured wire mesh guarding in question.

Citation No. 3061707

I conclude and find that the failure of the dredge operator to wear a life jacket while performing his work duties on the slippery deck of the dredge which was not protected by handrails constituted a significant and substantial violation. Given the fact that the dredge operator works alone in water which is sometimes as much as 30 feet deep, if he were to slip and fall off the dredge without a life jacket, and possibly strike his head on the metal deck, I believe that one could conclude that he would likely drown. The inspector's "S&S" finding IS AFFIRMED.

With regard to Citation No. 3061711, concerning the lack of a fire extinguisher in the shop area where welding was taking place with an electrical arc and cutting torch, the evidence establishes that the welding work was not being performed inside the shop where the 55-gallon drums of oil were stored in one corner. The work was being done outside the shop some 12 to 15 feet from where the drums were located. Inspector Smiser conceded that it was possible that the respondent was performing the welding outside of the shop as a precautionary measure to insure some distance between the welding work area and the area where the drums were stored. The inspector also confirmed that in the event of a fire, the employees in the shop area would have no difficulty in exiting the shop. Mr. LeBlanc confirmed that the welding work was taking place at ground level, and he did not believe that any sparks generated by the welding activity could reach the drums which were stored in the corner of the shop.

Based on the facts presented here, I cannot conclude that the violation was significant and substantial. Given the fact that the welding was taking place at ground level outside the shop, and some distance from the stored oil drums, I find it unlikely that any sparks generated by the welding activity would reach the drums and ignite the oil and cause a fire. Further, I find no evidence that the lack of a fire extinguisher presented any electrical hazard. Under the circumstances, the inspector's "S&S" finding IS REJECTED, and the citation is modified to a non-"S&S" citation.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

Based on the stipulations by the parties and Mr. LeBlanc's unrebutted testimony concerning the size and scope of his operation, I conclude and find the respondent is a very small mine operator.

The parties have stipulated that payment of any civil penalty assessments in this case will not adversely affect the respondent's ability to continue in business. I adopt this stipulation as my finding and conclusion on this issue.

of Prior Violations

LeBlanc stated that he has operated his present since 1984. Although the petitioner's proposed stipulation ALJ-1, and the information which appears on proposed assessment Form 100-179, reflects that the

respondent had no prior assessed violations for the 24-month period prior to the issuance of the citations in issue in this case, Mr. LeBlanc believed that he had three prior citations. However, he could provide no further information, and the petitioner could not elaborate further.

Since the burden of establishing any prior violations lies with the petitioner, and since the petitioner did not present any computer print-out or other evidence with regard to any prior assessed violations, I conclude and find that for purposes of the civil penalty assessments made by me for the violations which have been affirmed, the respondent has no history of prior assessed violations.

Good Faith Compliance

Mr. LeBlanc testified that his operation has never experienced an accident or injury, and that he has a concern for the safety of his employees and has always taken prompt corrective action to abate any violative conditions brought to his attention. He confirmed that he always welcomes any MSHA inspection in order to maintain a safe working environment for his employees, and that all of the citations in this case were promptly abated within 24 hours.

Inspector Smiser agreed with Mr. LeBlanc's testimony, and the parties have stipulated that all of the citations were abated in good faith by the respondent within 24 hours. Accordingly, I conclude and find that the respondent exhibited rapid good faith compliance in correcting the cited conditions, and this is reflected in the civil penalties which I have assessed for the violations which have been affirmed.

Negligence

For the reasons stated by the inspector, I agree with his moderate negligence findings with respect to Citation Nos. 3061706, 3061707, and 3061711, and these findings are all affirmed. I also agree with his low negligence findings with respect to Citation No. 3061712, and his finding in this regard is affirmed.

Gravity

In view of my "S&S" findings with respect to Citation Nos. 3061706 and 3061707, I conclude and find that these violations were serious. I further conclude and find that the violation cited in Citation No. 3061711, was non-serious.

Civil Penalty Assessments

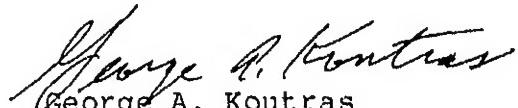
On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed in this proceeding:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3061705	03/01/88	56.14006	\$ 30
3061706	03/01/88	56.14001	\$ 70
3061707	03/01/88	56.15020	\$ 65
3061708	03/01/88	56.14001	\$ 20
3061711	03/01/88	56.4606(a)(1)	\$ 20
3061712	03/01/88	56.14001	\$ 20

ORDER

The respondent IS ORDERED to pay the civil penalties assessed in this proceeding within thirty (30) days of this decision and order. Upon receipt of payment by the petitioner, this case is dismissed.

Citation Nos. 3061709, 3061710, 3061713, and 3061714 ARE VACATED, and the proposed civil penalty assessments ARE denied and dismissed.



George A. Koutras
Administrative Law Judge

Distribution:

Brian L. Pudenz, Esq., Office of the Solicitor, U.S.
Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX
75202 (Certified Mail)

Dudley J. LeBlanc, Owner, LeBlanc's Concrete & Mortar Sand Company, 1400 Millie Street, Rosenberg, TX 77471
(Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 24 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. KENT 88-152
Petitioner : A.C. No. 15-13469-03658
v. :
GREEN RIVER COAL COMPANY, : Green River Coal No. 9 Mine
Respondent :
:

DECISION

Appearances: Joseph B. Luckett, Esq., Office of the
Solicitor, U.S. Department of Labor, Nashville,
Tennessee, for the Petitioner;
B. R. Paxton, Esq., Paxton & Kusch, Central
City, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for four alleged violations of certain mandatory safety standards found in Part 75, Title 30, Code of Federal Regulations. The respondent filed a timely notice of contest and a hearing was conducted in Owensboro, Kentucky. The parties were afforded an opportunity to file posthearing arguments, but did not do so. However, I have considered their oral arguments made during the hearing in my adjudication of this matter.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalties to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether the violations were "significant and substantial." Additional issues raised

by the parties are identified and disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

The parties stipulated to the following (Exhibit P-1):

1. The presiding judge has jurisdiction to hear and decide this case.
2. The respondent employs approximately 200 workers, and produces over one million tons of coal per year.
3. The civil penalty assessments in question will not affect the respondent's ability to continue in business.
4. The respondent acted in good faith and timely abated the alleged violations.
5. The respondent's history of previous violations for the 2-year period preceding March 21, 1988, is as indicated in MSHA's computer print-out (Exhibit P-2).

Discussion

During a prehearing conference prior to the taking of testimony, the parties informed me that they proposed to settle Citation Nos. 3227255 and 3227256, and that the respondent agreed to pay the full amount of the proposed civil penalty assessments, and to withdraw its notice of contests with respect to these citations. The proposed settlement was approved from the bench, and my decision in this regard is affirmed. The citations are affirmed as issued.

With regard to Citation No. 3227257, respondent's counsel confirmed that although the respondent does not dispute the fact of violation, or the inspector's "S&S" finding, it does dispute the appropriateness of the proposed civil penalty assessment. Counsel also confirmed that the parties have discussed a settlement of the case but that the petitioner's

counsel would not agree to any reduction in the proposed civil penalty assessment. Under the circumstances, evidence was taken on this citation, and the parties were afforded an opportunity to present arguments with regard to the appropriate civil penalty assessment.

With regard to Citation No. 3227259, respondent's counsel confirmed that the respondent still desired to continue its contest on this alleged violation, and testimony and evidence was taken in this regard.

All of the section 104(a) "S&S" Citations in this case were issued by MSHA Inspector Jerrold Pyles on March 21, 1988. Mr. Pyles issued an initial section 107(a) imminent danger order and cited four alleged violations which are as follows:

Citation No. 3226255, cites a violation of 30 C.F.R. § 75.200, and the cited condition or practice is described as follows:

The inby and outby brows located at cross-cut 6, on the 5 D-belt, had not had additional support set where a roof fall had occurred, according to the rock loading plan on page 9 of roof-control plan dated Dec. 3, 1987. Also refer to page 6, art. 22 B and D.

Citation No. 3227256, cites a violation of 30 C.F.R. § 75.200, and the cited condition or practice is described as follows:

The timber plan, located in roof-control plan dated Dec. 3, 1987, on page 13 in sketch was not followed at crosscut 6 on the 5 D-belt. A roof fall had occurred in this area and there were no timbers from the beginning of fall (3 ft. outby crosscut) to end of fall, at end of intersection. Two bolts in cavity on either side of belt were not touching roof. Water was coming through top in this area.

Citation No. 3227257, cites a violation of 30 C.F.R. § 75.400, and the cited condition or practice is described as follows:

At cross cut No. 6 on the 5 D-belt where roof fall had occurred, grey shale had slid against belt and belt was running against it. Also a piece was lodged between bottom and top

belt. Belt was also rubbing against a wooden holy board used to prop belt rope up; there were four frozen or stuck rollers in this area (approximately 24 ft.) and belt line from tail-piece to this area (approx. 540 ft.) had float dust under and in crosscuts along the belt, areas were light brown to black.

Citation No. 3227259, cites a violation of 30 C.F.R. § 75.1403(5)(g), and the condition or practice is described as follows:

A clear travelway of at least 24 inches was not provided on the 5 D-belt crosscut No. 6, in that rock had fallen down against belt due to a roof fall and had the travelway partially blocked to where a man or person would have to walked (sic) over the top of it. Area was wet and slippery on top of the grey shale.

MSHA Inspector Jerrold Pyles testified as to his experience and training, and he confirmed that he issued Citation No. 3227259 (exhibit P-8). He confirmed that a rock fall had previously occurred at the No. 6 crosscut where the number 5 D-belt was located, and that the rock had slipped down on each side of the belt partially blocking the travelway on each side of the belt. Mr. Pyles identified exhibit P-5 as a copy of his notes which include a sketch of the fall area.

Mr. Pyles described the extent of the fall, and confirmed that the rock covered both sides of the belt. He stated that the rock was approximately 2 feet high and extended for a distance of 10 to 12 feet along both sides of the belt. He confirmed that the area was wet, and although the rock was slippery in spots, there was no standing water in the area. He also confirmed that most of the rock fall had been loaded out, and that coal was being loaded out on the belt.

Mr. Pyles stated that he made a gravity finding of "reasonably likely" because he believed that a belt examiner walking the belt line for the purpose of examining the belt pursuant to standard section 75.303, would have to walk over the rock to examine the belt, and since the rock was slippery, the examiner could fall into the belt if it were moving. If it were not moving, the examiner could slip on the rock and suffer injuries if he were to strike the belt. Mr. Pyles confirmed that the shift started at 8:00 a.m., and that he issued the citation at 10:00 a.m.

Mr. Pyles stated that only the belt examiner would be exposed to the hazard, and although he observed a man in the area, he did not know what he was doing there. Mr. Pyles confirmed that in the event of a slip off the rock, the examiner would likely suffer serious injuries or bruises depending on whether the belt was running or not, and that lost time would likely result from such injuries.

Mr. Pyles confirmed that he made a negligence finding of "moderate" because the respondent had loaded out most of the rock fall and was loading out coal on the belt. He believed that the operator was aware of the condition, but conceded that the rock in question could have slipped after the initial rock fall occurred and was loaded out. Mr. Pyles confirmed that he based his "S&S" finding on his belief that it was reasonably likely that an accident would occur and that serious injuries would follow.

Mr. Pyles identified exhibit P-9, as a copy of a previous safeguard notice he issued on January 21, 1987, citing mandatory standard section 75.1403(5)(g), and he confirmed that he based his citation on that safeguard notice. Mr. Pyles could not recall the details concerning the conditions which prevailed at the time of the safeguard notice, and he confirmed that no rock fall was involved. He stated that once a safeguard notice is issued, it becomes law for the mine, and in the event of a subsequent repeat violation, a citation would be issued. He also confirmed that the cited condition was corrected and the citation was terminated at 4:30 p.m., the same date that it was issued.

On cross-examination, Mr. Pyles stated that although the belt examiner could walk around the rock on either side of the belt, and had enough room to shine his light on the belt, his passage would be restricted and he would still be required to walk over the slippery rock in order to adequately inspect the belt. He conceded that the belt examiner had enough room to walk around the belt to shine his light, and that he could get within 10 feet of the belt to observe it, and that by doing this, he would be in a safe position.

Mr. Pyles confirmed that the belt examiner would be looking for fallen rocks, spillage, and stuck belt rollers, and that he would also be required to shut the belt down in the event of a hazardous condition. In order to adequately do his job in this regard, the belt examiner would necessarily have to walk over the slippery fallen rock.

Mr. Pyles did not know when the rock slipped, and he agreed that the cited condition could have occurred between the time the belt examiner last walked and examined the belt and the time he arrived on the scene. Mr. Pyles confirmed that pursuant to section 75.303, belt conveyors are required to be examined at any time during the shift and after coal production has started. Mr. Pyles confirmed that he did not speak to the belt examiner or examine the preshift books.

Mr. Pyles confirmed that after the initial rock fall, enough rock was removed to facilitate the reinstallation of the belt, and he confirmed that he observed evidence of work being done to correct the rock fall conditions. He also confirmed that the prior roof and rock fall cavity had been re-bolted and the roof re-supported. In the final analysis, it was his judgment that the rock which had slipped restricted passage on either side of the belt and it did not afford the belt examiner enough room to pass through the area to adequately view and inspect the belt.

Grover Fischbeck, respondent's former safety manager, confirmed that he was with Inspector Pyles during the course of his inspection, and that the citation was served on him. He confirmed that an initial roof fall had occurred in the cited area earlier in the week of March 21, 1988, and that the rock was removed from the center of the crosscut down to the mine floor level, and that rock was scaled down to clear out any remaining loose rock. He also confirmed that the roof was fully supported, and that he did not know when the rock which was present when he and Mr. Pyles observed it during the inspection fell, and that the last time the belt was "made" was during the last shift on the day before the inspection.

Mr. Fischbeck believed that the belt area in question could have been visually inspected by the belt examiner safely by walking up to edge of the belt where the rock had fallen and then walking around the adjacent entry and viewing the belt from the other side. If this were done, the belt examiner would not have been exposed to any hazard.

Mr. Fischbeck stated that while he and Mr. Pyles were in the cited area, he observed belt examiner Hubert Hunt walk up to the edge of the belt where the rock was located and observe the belt, but that he did not speak to him at that time. Mr. Fischbeck stated that he was surprised to find the rock when he and Mr. Pyles arrived at the scene.

Mr. Fischbeck confirmed that he was familiar with the prior safeguard notice issued by Mr. Pyles and confirmed that

it did not involve a rock or roof fall. He explained that the installation of timbers in an area adjacent to a belt which had been installed off-center restricted the adjacent walkway in such a manner as to reduce the clearance to less than 24 inches, and that additional rock had to be scaled down to further widen the walkway to permit access for the belt examiner.

On cross-examination, Mr. Fischbeck stated that the belts are not usually examined unless they are in operation, and that this is necessary in order to inspect the belts for hazards under actual operational conditions. He confirmed that the rock had slipped down from the side of the entry and was resting against the belt, but that it was not uniformly 2 feet high along the 10 feet distance in which it was resting against the belt. He estimated that the height of the rock ranged from 1-1/2 to 2 feet, and that the belt was 18 to 24 inches high off the mine floor. He agreed that the rock caused some blockage of the walkway and that it presented a stumbling hazard.

Inspector Pyles confirmed that he issued Citation No. 3227257 (exhibit P-7), after observing loose coal and coal dust ranging from zero to 8 inches on either side of the 5 D-belt. He also observed that a piece of the shale rock which had slipped against the belt was rubbing the belt top and bottom, and that the belt was also rubbing against a roof support "header" or "holy" wooden board which was being used to support a cable. The rock had knocked the belt out of line against the board causing it to touch and rub against the belt. He described the dimensions of the board as 10 x 16 inches. Mr. Pyle also confirmed that he observed four stuck belt rollers which were not turning within a belt area of 24 feet, and float coal dust under the belt and in the crosscuts for a distance of approximately 540 feet from the belt tail piece to the area where the rock fall had occurred.

Mr. Pyles stated that the belt was running, and he believed that any friction caused by the belt rubbing against the rock and board, and the stuck rollers which were not turning, were potential ignition sources and could have ignited the float coal dust. Although the area was wet, some of the float coal was on top of the wet areas, but when he picked up a handful of the float coal dust and squeezed it, it was dry and not damp. He also confirmed that he did not otherwise "test" float coal dust accumulations and simply observed it visually. He described the float coal dust as "light brown to black" in color.

Mr. Pyles confirmed that he made a gravity finding of "reasonably likely," and he believed that in the event of a fire it was reasonably likely that 12 miners working on the section would be exposed to fire, smoke inhalation, and entrapment hazards. He also confirmed that he based his "S&S" finding on the fact that if mining were allowed to continue it was reasonably likely that a fire would have occurred and exposed miners to the aforementioned hazards.

On cross-examination, Mr. Pyles stated that his principal concern was the potential fire which could result from the presence of the accumulations of loose coal and coal dust, and the potential ignition sources which were present. He confirmed that he observed no fire sensors on the belt, but conceded they could have been present because each belt is normally provided with a fire sensor system.

Mr. Fischbeck testified that the board referred to by Mr. Pyles was saturated with water and that no float coal dust or other combustibles were present in the area where the board was located. With regard to the belt rubbing against the rock, Mr. Fischbeck believed that given the fact that it was a rock and not coal, there was a low potential for any fire.

Mr. Fischbeck identified exhibit P-12 as a copy of the most recent fire boss examination records which he supplied, and he stated that the examination record for March 21, makes no reference to any hazardous conditions in the areas cited Mr. Pyles. Although the records indicated that some areas needed to be cleaned up and rock dusted on March 18 and 19, since these conditions were not noted on the record for March 21, he assumed they had been corrected and were not present on March 21.

Mr. Fischbeck confirmed that Mr. Pyles took no samples of the loose coal or coal dust, and that clean-up and rock dusting is performed periodically on the section. He agreed that 12 miners were working on the section on the day of the inspection, but that an alternative fire escape route was available to these individuals through the intake air course.

Mr. Fischbeck stated that his notes reflect that the area cited by Mr. Pyles was damp and rock dusted. He stated that dry coal dust is not uncommon, and agreed that the tail piece needed to be shovelled because of some coal spillage, and that shovelling is done periodically at that location.

Mr. Fischbeck stated that fire detection sensors were in place on the belt line, and that 2 inch fire hoses and water

lines were available along the belt for use in the event of a belt fire. The detection devices were located down the center of the belt, and they were suspended from the roof.

Findings and Conclusions

Fact of Violations

Section 104(a) "S&S" Citation Nos. 3227255 and 3227256, 30 C.F.R. § 75.200

As previously noted, the parties agreed to settle these violations, and the respondent conceded the fact of violations, including the inspector's significant and substantial (S&S) findings, and agreed to pay the proposed civil penalty assessments in full. The proposed settlements have been approved, and the citations and violations ARE AFFIRMED AS ISSUED.

Section 104(a) "S&S" Citation No. 3227257, 30 C.F.R. § 75.400

The respondent does not dispute the fact of violation or the inspector's "S&S" finding, and only contests the reasonableness of the proposed civil penalty assessment of \$1,000, for the violation (Tr. 71). Under the circumstances, the citation and violation ARE AFFIRMED, and my findings and conclusions concerning the mitigation of the proposed civil penalty assessment follow below.

I take note of the respondent's answer to the citation and its assertion that at the time of the inspection which led to the issuance of the violation, the respondent was doing everything humanly possible to expeditiously address the conditions caused by the initial rock fall and that it was addressing the most serious condition first. During oral argument at the hearing, respondent's counsel confirmed that this was the case, and he pointed out that all of the citations issued in this case arose out of the same circumstance's, and that the respondent has agreed to pay the full amounts of the civil penalty assessments made for the two violations which have been settled. Petitioner's counsel asserted that in seeking a civil penalty assessment in the full amount of \$1,000 for the violation, he does not rely on the narrative findings and conclusions of MSHA's "special assessment officer," but does rely on the testimony of the inspector who issued the citation (Tr. 73).

It is clear that I am not bound by MSHA's proposed penalty assessment, nor am I bound by the narrative findings of its

Office of Assessments. I am free to make my own judgment as to the reasonableness and appropriateness of any civil penalty assessment based on the credible evidence and testimony adduced by the parties, including any mitigating factors which I may conclude warrant any adjustments in the proposed civil penalty amount.

As noted earlier, the respondent does not dispute the fact of violation, or the existence of the conditions which prompted the inspector to issue the violation. It has, however, presented credible and probative evidence which in my view mitigates its culpability, and the seriousness of the possible fire hazard presented by the cited conditions.

Respondent's former safety manager Grover Fischbeck confirmed that the belt conveyor in question was equipped with workable fire detection devices which would have alerted anyone of any fire on the belt. He also confirmed that the belt was provided with a 2-inch water line with fire hose outlets spaced periodically throughout the belt line, and that fire hoses were located at the working section, as well as the unit header, and that all of the fire hoses and detection systems were operational (Tr. 96-98). Inspector Pyles confirmed that the belt was protected by fire suppression devices consisting of a "fire line" equipped with fire sensor heads (Tr. 81). Although the inspector noted that he did not particularly notice any of these devices, he confirmed that they are normally provided on every belt in the mine, and he agreed that the existence of these devices would be relevant in any gravity determination. He conceded that he did not issue any violation for the failure by the respondent to provide any such fire fighting devices, and he agreed that they could have been in place and operational (Tr. 81-82). With regard to his initial imminent danger order which was issued in conjunction with the issuance of the section 104(a) citation in question, the inspector conceded that his gravity finding of "reasonably likely" in connection with the citation would indicate a degree of hazard less than a hazard that is characterized as "imminent," and that the cited conditions presented a possibility of a fire (Tr. 83-84).

Although Mr. Fischbeck conceded that the board which was rubbing against the belt was combustible, he also indicated that it was saturated with water which was leaking from the roof, and he considered the rock which was rubbing the belt as a low potential fire source. According to Mr. Fischbeck's inspection notes, the belt tailpiece was extremely wet, and the belt line was damp in different areas, including the area where the fall had occurred (Tr. 89). Mr. Fischbeck also

pointed out that in the absence of any tests, or samples, it is difficult to determine how much rock dust may be mixed in with the coal dust, and that on the day of the inspection no rock dust samples were taken (Tr. 89). Mr. Fischbeck also believed that in the event of a fire, the miners could have escaped by an alternate route (Tr. 91).

Inspector Pyles confirmed that no rock dust samples were taken, and although he indicated that he picked up a handful of float coal dust and squeezed it in his hand and no moisture came out, he conceded that he only did this in one area (Tr. 102). He also agreed with Mr. Fischbeck's testimony that the area was damp, but indicated that the float dust he observed was lying on top of the damp and wet areas (Tr. 100). Mr. Pyles also confirmed that the four stuck belt rollers were not turning in any coal accumulations, and that he did not issue any separate violation for the stuck roller condition because there were not enough stuck rollers to warrant another citation (Tr. 103).

Having viewed the witnesses during the course of the hearing, I consider Mr. Fischbeck to be a credible witness. His testimony concerning the presence and availability of fire detection and suppression devices on the belt line in question, and his observations concerning the damp and wet conditions in some of the areas in question mitigate the seriousness or gravity connected with a potential fire hazard on the belt line in question.

I take note of the fact that Inspector Pyles made a negligence finding of "moderate," and he confirmed that at the time of the inspection most of the rock fall had been loaded out. He conceded that the rock which slipped against the belt could have slipped after the initial rock fall occurred and had been loaded out, and that the sliding rock caused the movement of the belt and could have caused some of the coal spillage (Tr. 101). Mr. Pyles also confirmed that he saw evidence of work being done to correct the rock fall conditions. This lends credence to the respondent's assertion that it was attempting to correct the conditions resulting from the initial fall of rock.

Mr. Fischbeck testified that on the day of the inspection, he was surprised to find that the rock had slipped against the belt, and that when he spoke with the belt examiner that same day after the inspection, the examiner advised him that the rock was not there the day before (Tr. 57). The inspector confirmed that he based his moderate negligence finding on the fact that his examination of the belt examiner's reports

reflected that some of the cited conditions had been noted in the reports, and he concluded that the examiner should have been aware of them. The examiner's reports (exhibit P-12), for March 18 to March 21, 1988, contains notations that certain areas of the 5-D belt were "dirty" and were in need of rock dusting. However, I find nothing to reflect the existence of any stuck rollers or the belt rubbing against any rock or board.

The belt examiner did not testify in this case, and Inspector Pyles confirmed that he did not speak with him during the course of his inspection. Mr. Fischbeck assumed that the conditions noted in the belt examiner's reports had been corrected because the subsequent reports made by the last person to walk the belt did not note the existence of those conditions (Tr. 92). I find no evidence to support any conclusion that the conditions associated with the stuck rollers or the belt rubbing against the rock were present for any extended period of time prior to the inspection. Under all of these circumstances, I conclude and find that the respondent's negligence is to some degree mitigated.

Citation No. 3227259, 30 C.F.R. § 75.1403-5(g)

The inspector issued the citation after finding that a clear travelway of at least 24 inches was not provided on the cited belt conveyor (exhibit P-8). The cited mandatory criteria for belt conveyors found in 30 C.F.R. § 75.1403-5(g), provide as follows:

A clear travelway at least 24 inches wide should be provided on both sides of all belt conveyors installed after March 30, 1970. Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor.

In addition to the conditions observed by the inspector which led him to conclude that a clear travelway was not maintained in compliance with the cited standard, the inspector cited and relied on a previously issued Safeguard Notice No. 2215634, which he served on the respondent at the same mine on January 21, 1987 (Exhibit P-9). That notice was issued pursuant to section 75.1403-5(g), and it states as follows:

A clear travelway at least 24" wide was not provided on both sides of the 7B belt

between xcuts Nos. 88 & 89. There was less than 24" on one side of belt between roof support (timbers) and rib nor between belt and roof support. This is a notice to provide safeguard.

MSHA's regulatory authority for issuing safeguard notices which subsequently become mandatory for the mine is found in 30 C.F.R. § 75.1403, which is the statutory language found in section 314(b), of the Act. It provides as follows:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Section 75.1403-1 provides:

(a) Sections 75.1403-2 through 75.1403-11 set out the criteria by which an authorized representative of the Secretary will be guided in requiring other safeguards on a mine-by-mine basis under section 75.1403. Other safeguards may be required.

(b) The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to section 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

(c) Nothing in the sections in the section 75.1403 series in this Subpart O precludes the issuance of a withdrawal order because of imminent danger.

In Southern Ohio Coal Company (SOCCO), 7 FMSHRC 509 (April 1985), the Commission noted that the safeguard provisions of the Act confer upon the Secretary "unique authority" to promulgate the equivalent of mandatory safety standards without resort to the otherwise formal rulemaking requirements of the Act. The Commission held that a safeguard notice, unlike other ordinary safety standards, must be strictly construed, and that the safeguard must give the mine operator

clear notice of the nature of the hazard and the conduct required of the operator to stay in compliance.

In SOCCO, an inspector issued a citation after finding water 10 inches in depth from rib to rib at a stopping located along a belt conveyor. Because of the presence of the water, the inspector believed that a clear travelway of 24 inches was not provided along the conveyor belt as required by a previously issued safeguard notice. The safeguard notice was issued after the inspector found fallen rock and cement blocks at three locations along a conveyor belt. Addressing the question as to whether the safeguard notice referencing "fallen rock and cement blocks at three locations," and requiring 24 inches of clearance on both sides of the conveyor belt, should have put SOCCO on notice that conditions such as the water described in the citation fell within the safeguard's prohibitions, the Commission concluded that it did not. In this regard, the Commission stated as follows at 7 FMSHRC:

Given the frequency of wet ground conditions in the mine, and the basic dissimilarity between such conditions and solid obstructions such as rocks and debris, we find that SOCCO was not given sufficient notice by the underlying safeguard notice issued in 1978 that either wet conditions in general or the particular conditions cited in 1983 by the inspector in this case would violate the underlying safeguard notice's terms.

We do not hold that a safeguard notice pertaining to hazardous conditions caused by wetness could not be issued. Conditions such as those cited by the inspector here, if hazardous, can just as readily be eliminated by issuance of safeguard notices specifically addressing such conditions. By taking this approach rather than bootstrapping dissimilar hazards into previously issued safeguard notices, the operator's right to notice of conditions that violate the law and subject it to penalties can be protected with no undue infringement of the Secretary's authority or loss of miner safety.

In a footnote at 7 FMSHRC 512, the Commission made the following observation: "The requirements of specificity and narrow interpretation are not a license for the raising or acceptance of purely semantic arguments We recognize

that safeguards are written by inspectors in the field, not by a team of lawyers."

In the instant case, the contested citation was issued by inspector Pyles after he found that the travelways on either side of the number 5D conveyor belt for a distance of some 10 feet at the location where the rock had slipped and fallen against the belt did not provide clear access for the passage of a belt examiner who was required to walk and examine the belt for hazards. The inspector found that the travelways were partially obstructed by the rock, and although he believed that the belt examiner could still travel through both sides of the travelway adjacent to the belt, he would have to walk over the top of the fallen rock which he considered to be hazardous because of its wet and slippery condition (Tr. 62). The inspector also believed that the obstructed travelways would not allow the belt examiner an opportunity to make an adequate close examination of the belt because the examiner could not position himself at a point which would have enabled him to see over the rock into the belt location where the stuck rollers were found (Tr. 36-37, 65-66). The inspector believed that any attempt by a belt examiner to walk over the slippery rock which obstructed the belt travelways would have exposed him to a possible fall with serious injuries, and the possibility of his falling into the moving belt (Tr. 16).

Mr. Fischbeck believed that the belt examiner could have safely inspected the belt, but he conceded that given the 10 feet area where the rock had slipped against the belt, the examiner would not be able to walk the belt in its entirety (Tr. 46). Mr. Fischbeck believed that the belt examiner could have safely examined the belt by walking up to the area where the travelways were obstructed by the rock, viewed the belt, and then walked around the crosscut to the other side of the belt, and viewed it from that position (Tr. 46, 50). Although Mr. Fischbeck believed that the examiner could have visually inspected the belt from these positions, he conceded that in one area of the belt the rock, which he estimated was 18 inches to 2 feet thick, was resting across the top of the belt (Tr. 53). He confirmed that rock was on both sides of the belt, and that more of it was located on the front or supply road side of the belt, than on the back side (Tr. 56).

Mr. Fischbeck agreed that the inspector issued the citation because "there was some stumbling hazards" and that "there was some obstructions in it" (Tr. 56-57). Mr. Fischbeck confirmed that during the inspection he observed the belt examiner approach the belt area where the rock had slipped, squat down, and then proceed out the supply road to the other side of the

belt (Tr. 54, 57). Although Mr. Fischbeck believed that the procedure used by the belt examiner to examine the belt would have provided him with a safe means of doing so, he conceded that by doing it in this manner, the belt examiner "would not be exposed to walking over the rock that had slid down to the belt" (Tr. 46).

After careful examination of all the testimony and evidence presented with respect to this citation, I conclude and find that the travelways along both sides of the belt conveyor for a distance of approximately 10 feet where the rock had slipped and fallen against the belt were obstructed and were not maintained with a clearance of at least 24 inches wide. I also conclude and find that the obstructed travelways would not allow the belt examiner to make a complete and thorough inspection of the belt, and that the wet and slippery rock conditions presented a hazard to any belt examiner attempting to climb or walk over it, particularly while the belt was running.

Inspector Pyles believed that his previously issued safeguard notice presented the same situation as that which was present when he issued the citation in question, namely, the obstruction of travelways along a belt conveyor (Tr. 20). Mr. Pyles was of the opinion that regardless of the conditions which may cause a belt travelway to be restricted, if a clear travelway of at least 24-inches is not provided in accordance with the safeguard notice, a violation is established (Tr. 63-64).

The respondent's credible testimony by Mr. Fischbeck reflects that the obstructed travelways which prompted the issuance of the initial safeguard notice were the result of the timbering of an area where the belt was out of line, and did not involve any fallen or slipped rocks. The location of the belt near the rib, coupled with the installation of roof timbers, resulted in the restriction of the travelways which did not provide for a clearance of at least 24 inches, and a jackhammer had to be used to scale the rib to provide more clearance (Tr. 48-49). Inspector Pyles confirmed that this was in fact the case (Tr. 64).

During oral argument on the record, respondent's counsel took the position that the citation should be dismissed because the previously issued safeguard notice was based on timbering conditions which did involve any rock falls or slips (Tr. 23, 43). Counsel asserted that the prior safeguard concerned travelway conditions which were "man made," and that the rock slip in connection with the contested citation was not such a

condition (Tr. 50). In support of his argument, counsel cites the decision of the late Judge Carlson in Mid-Continent Resources, inc., 7 FMSHRC 1457 (September 1985). In that case an inspector issued a safeguard notice pursuant to section 75.1403-5(g), because coal sloughage obstructed a part of a 24-inch travelway on one side of a belt. Upon a subsequent inspection, the inspector found another 24-inch travelway on another belt obstructed by coal sloughage, timber, and a 1-foot wide trench. Responding to the same argument as that made by the respondent in this case, and relying on the Commission's decision in Southern Ohio Coal Company, supra, Judge Carlson concluded that the citation was valid with respect to the coal sloughage, but invalid with respect to the trench and timbers, and his reasoning for these conclusions are stated as follows at 7 FMSHRC 1461:

Under the Commission's reasoning in Southern Ohio, I am not convinced that either the shallow trench or the timbers in the 24-inch travelway were encompassed within the limits of the underlying notice to provide safeguards. The specification of "coal sloughage" in the original notice was broad enough to embrace the casual presence or accumulation of coal or similar solid objects in the travelway. It was not, however, broad enough to include a wholly dissimilar impediment to travel such as a shallow trench. The trench differed from such solid objects in much the same way as accumulated water in Southern Ohio differed from the rocks and construction debris which were covered by the previous safeguard.

The status of the timbers which allegedly impinged on the walkway space is not so clear. Had the timbers been left on the floor to join the coal sloughage as tripping-and-falling hazards, they should logically be treated as a "similar" hazard covered by the underlying safeguard. The inspector's testimony, however, indicated that the timbers were not merely a loose impediment lying on the floor. Rather, they were upright timbers installed as a part of the roof control system (Tr. 29). The timbers therefore constituted what may be referred to as an essential part of the underground mine structure. In that sense they represented an abatement problem far different from the mere

removal of random obstacles left on the travelway floor. They differed enough from the class of objects akin to coal sloughage to remain outside the reasonable scope of the inspector's notice of safeguard.

With regard to the assertion that the conveyor referred to in the safeguard notices was at a location different from that referred to in the citation, Judge Carlson found this difference to be of no legal significance because the safeguard notice was directed to all conveyors in the mine, and the evidence established that both conveyors were of the sort covered by 30 C.F.R. § 75.1403-5(g), 7 FMSHRC 1462.

In the instant case, the safeguard notice issued by Inspector Pyles on January 21, 1987, citing section 75.1403-5(g), specifically addressed the lack of 24 inches of clearance on both sides of a conveyor belt travelway which was restricted by roof support timbers. The notice stated that there was less than 24 inches on one side of the belt between the roof support and the rib, and less than 24 inches on the other side between the belt and the roof support. The second sentence of section 75.1403-5(g), provides as follows: "Where roof supports are installed within 24 inches of a belt conveyor, a clear travelway at least 24 inches wide should be provided on the side of such support farthest from the conveyor."

Inspector Pyles could not recall the circumstances under which he issued the safeguard notice. However, he agreed with Mr. Fischbeck's explanation that the notice was issued because the installation of roof support timbers adjacent to the belt travelways restricted the clearance on either side of the belt to less than 24 inches. Inspector Pyles also agreed that the safeguard notice did not involve any rock falls or slips. Although he provided credible testimony with respect to the slip and fall hazards associated with any attempt by a belt examiner to climb over the wet and slippery rock which obstructed the belt travelways on March 21, 1988, no testimony or evidence was presented with respect to the hazards associated with a restricted travelway caused by the installation of roof support timbers close to a belt conveyor belt, or whether or not a belt examiner would have been prevented from conducting his required examination of the belt because of such a condition.

Given the Commission's decision in Southern Ohio Coal Company, supra, and the reasoning by Judge Carlson in Mid-Continent Resources, Inc., supra, with which I agree, I conclude and find that the conditions relied on by Inspector

Pyles in issuing the initial safeguard notice, conditions which came about by the installation of roof timbers too close to a belt conveyor which was out of line, and which required the use of a jack hammer to shear off a rib to provide more clearance, were different from the rock fall and slippage which restricted the travelways cited by Mr. Pyles in his citation of March 21, 1988. In short, I conclude and find that the travelway impediment caused by the installation of roof support timbers was dissimilar from any impediment caused by the rock which had slipped and fallen against the belt and that the safeguard notice relied on by Inspector Pyles was not broad enough to encompass the conditions cited in the citation. Under the circumstances, I further conclude and find that Mr. Pyles' reliance on the safeguard notice to support the citation was invalid, and that the citation was improperly issued. Accordingly, the citation IS VACATED.

Based on the stipulations by the parties, I conclude and find that the respondent is a medium-to-large size mine operator, and that the civil penalty assessments for the violations which have been affirmed will not adversely affect its ability to continue in business. I also conclude and find that the respondent acted in good faith in timely abating the violations in question, and I affirm the inspector's moderate negligence findings. I also conclude and find that the violations were serious.

Civil Penalty Assessments

I have approved settlements for two of the contested citations, and the respondent has agreed to pay the full amount of the proposed civil penalty assessments for the violations in question, as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3227255	03/21/88	75.200	\$800
3227256	03/21/88	75.200	\$800

With regard to Citation No. 3227257, concerning a violation of 30 C.F.R. § 75.400, because of the accumulations of float coal dust along the cited belt conveyor line, the respondent admitted to the fact of violation and did not dispute the inspector's significant and substantial (S&S) finding with respect to the cited conditions. Given the extent of the accumulations, which have not been rebutted by the respondent, and the potential fire hazard which existed on the belt line, and notwithstanding the existence of fire detection and suppression devices which were on the belt line, I nonetheless

agree with the inspector's S&S finding which has been conceded by the respondent.

Petitioner's Exhibit P-2 is a computer print-out detailing the respondent's prior compliance record for the period March 21, 1986, through March 20, 1988, and the parties have stipulated that this print-out reflects the respondent's history of prior violations for the 2-year period prior to the issuance of the citations in question in this case. The print-out reflects that the respondent was issued 1,012 violations, 746 of which are S&S violations. It also reflects that the respondent has paid \$128,007, in civil penalty assessments for 973 of the listed violations.

The aforementioned print-out also reflects that for the 2-year period in question, the respondent paid civil penalty assessments for 167 prior violations of mandatory safety standard 30 C.F.R. § 75.400. Although I have taken into consideration the mitigating circumstances previously discussed with respect to the citation, I conclude and find that for an operation of its size, the respondent does not have a very good compliance record, particularly with respect to section 75.400, which deals with accumulations of coal dust and float coal dust. Accordingly, I have also taken this into consideration in the following civil penalty assessment which I have made for the citation in question.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3227257	03/21/88	75.400	\$800

ORDER

On the basis of the foregoing findings and conclusions IT IS ORDERED THAT:

1. Section 104(a) S&S Citation Nos. 3227255, 3227256, and 3227257 ARE AFFIRMED, and the respondent shall pay the aforementioned civil penalty assessments to the petitioner within thirty (30) days of the date of this decision and order.

2. Section 104(a) "S&S" Citation No.
3227259, March 21, 1988, 30 C.F.R.
§ 75.1403-5(g), IS VACATED.



George A. Koutras
Administrative Law Judge

Distribution:

Joseph B. Luckett, Esq., Office of the Solicitor, U.S.
Department of Labor, 2002 Richard Jones Road, Suite B-201,
Nashville, TN 37215 (Certified Mail)

B. R. Paxton, Esq., Paxton & Kusch, 213 E. Broad Street,
P.O. Box 655, Central City, KY 42330-0655 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 24 1989

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 88-94-M
Petitioner : A.C. No. 08-00176-05509
v. :
Clear Springs Mine & Mill
IMC FERTILIZER, INC., :
Respondent :

DECISION

Appearances: Ken S. Welsch, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Secretary of Labor (Secretary); George L. Bushn, Safety Director, for IMC Fertilizer, Inc. (IMC).

Before: Judge Broderick

STATEMENT OF THE CASE

The Secretary seeks civil penalties for two alleged violations of 30 C.F.R. § 56.9003, cited on June 28, 1988, because a Caterpillar front end loader and a Clark front end loader had inadequate brakes. Pursuant to notice, the case was called for hearing in Tampa, Florida, on March 16, 1989. Lawrence L. Richardson testified on behalf of the Secretary; Clarence L. Williamson, Charles Brown, Jessie Perez and Ed Gilmore testified on behalf of IMC. At the conclusion of the hearing the parties argued their positions on the record, and waived the right to file post-hearing briefs. I have considered the entire record and the contentions of the parties, and make the following decision.

appropriate should be increased because of it. The violations involved in this proceeding were promptly abated by IMC.

Lawrence L. Richardson, a Federal mine inspector made an inspection of the subject mine on June 28, 1988. Richardson has been a Federal mine inspector for approximately eleven years. Prior to that time, he worked in the mining industry in Florida for about 32 years. He has operated heavy equipment including front end loaders, has been employed as a mine superintendent and has owned his own contracting business. During his eleven years with MSHA, he has inspected the brakes of thousands of front end loaders.

CITATION 3249791-980 CATERPILLAR FRONT END LOADER

On June 28, 1988, IMC's 980 Caterpillar front end loader was in a holding area undergoing repairs for a faulty electrical light system. Inspector Richardson inspected the brakes, which were air over hydraulic, the back up alarm, the horn and the windshield wipers. He asked the mechanic to start the loader and drive forward until the inspector dropped his hand and then to apply the brakes. The loader came to a "slow stop." Before the brakes were applied the loader was travelling at about 10 miles an hour. After the brakes were applied it travelled 7 to 8 feet. The inspector asked the loader operator if the brakes felt "spongy" and the operator replied "yes." Inspector Richardson issued the subject citation charging that the brakes were not adequate. Approximately one quart of hydraulic brake fluid was added to the reservoir. The machine has two reservoirs, each holding about two quarts of fluid. The brakes were then tested in the same manner as previously, and the vehicle stopped in 2 to 3 feet. The violation was considered abated, and the citation was terminated. IMC's witnesses testified that the stopping distance was approximately the same on both tests. The operator of the vehicle was on sick leave and did not testify. However, a written statement taken from him by IMC Safety Supervisor Williamson was admitted into evidence. I am accepting as factual the testimony of Inspector Richardson based on his experience and expertise in performing the inspection.

CITATION 3249795 CLARK 275 FRONT END LOADER

On June 28, 1988, Inspector Richardson inspected the brakes on IMC's Clark 275 loader in the same manner as the 980 Caterpillar. The 275 loader is a much larger piece of equipment--perhaps twice as large as the Caterpillar. Again the vehicle stopped in approximately 7 to 8 feet after the brakes were applied. Again, in answer to the Inspector's question, the loader operator stated that the brakes felt spongy. The 275 Clark is equipped with an all air brake system; the brake pedal

is spring loaded. The mechanic adjusted the brakes--tightening the adjuster on one wheel by a half turn, and on the other wheels by a quarter turn. Thereafter, the brakes were tested in the same manner, the brakes locked, and the machine stopped in two or three feet. I accept the Inspector's testimony as factual for the same reasons I accepted his testimony concerning the stopping distances for the Caterpillar loader.

REGULATION

At the time the citations were issued, 30 C.F.R. § 56.9003 provided as follows:

Powered mobile equipment shall be provided with adequate brakes.

ISSUES

1. Whether the brakes on the cited equipment were adequate?
2. If violations are established, what are the appropriate penalties?
3. If violations are established, were they significant and substantial?

CONCLUSIONS OF LAW

Respondent at all relevant times was subject to the Federal Mine Safety and Health Act in the operation of the subject mine, and I have jurisdiction over the parties and subject matter of this proceeding.

I have accepted the Inspector's testimony as to the results of the tests he made on the two pieces of equipment: the equipment could be stopped in 7 to 8 feet prior to abatement and in 2 to 3 feet after abatement (the addition of fluid in the case of the Caterpillar; the adjustments in the case of the Clark). IMC's witnesses were of the opinion that brakes which stopped the equipment in 7 to 8 feet were adequate. They deny that the adding of fluid or the adjustment performed had any effect on the brakes' adequacy. Although the matter is not free from doubt, I am accepting the Inspector's opinion that the brakes on both pieces of equipment were inadequate when he tested them and issued the citations. I base this conclusion largely on the Inspector's extensive experience in the industry and as a Federal inspector.

However, the Secretary has not carried her burden of establishing that the violations were significant and substantial.

The inadequacy of the brakes was marginal. There is no evidence in the record that in the case of either of the loaders, there was a reasonable likelihood of a serious injury. The violations were, however, of moderate seriousness. Because of the size of the equipment, it is important that adequate brakes be maintained at all times. There is no evidence that the violations resulted from IMC's negligence. Based on the criteria in section 110(i) of the Act, I conclude that an appropriate penalty for each violation is \$50.

ORDER

Based on the above findings of fact and conclusions of law,
IT IS ORDERED:

1. Citations 3249791 and 3249795 are AFFIRMED, but the significant and substantial finding is VACATED.

2. Respondent shall within 30 days of the date of this decision pay the following civil penalties:

<u>CITATION</u>	<u>PENALTY</u>
3249791	\$ 50
3249795	<u>50</u>
TOTAL	\$100

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Ken S. Welsch, Esq., U.S. Department of Labor, Office of the Solicitor, Rm. 339, 1371 Peachtree St., N.W., Atlanta, GA 30367 (Certified Mail)

Mr. George L. Bushn, Safety Director, IMC Fertilizer, Inc., P.O. Box 867, Bartow, FL 33830 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
COLONNADE CENTER
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

APR 24 1989

UTAH POWER & LIGHT COMPANY, : CONTEST PROCEEDING
Contestant :
v. : Docket No. WEST 89-161-R
: Order No. 2876489; 3/20/89

SECRETARY OF LABOR, : Cottonwood Mine
MINE SAFETY AND HEALTH : Mine ID 42-01944
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Susan E. Chetlin, Esq., Timothy M. Biddle, Esq.,
Crowell & Moring, Washington, D.C.,
for Contestant;
Robert Cohen, Esq., Office of the Solicitor
U.S. Department of Labor, Arlington, Virginia,
for Respondent.

Before: Judge Morris

This case is before me under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (the "Act"), to challenge the issuance by the Secretary of Labor of an order charging Utah Power & Light Company ("UP&L"), with a violation of the regulatory standard published at 30 C.F.R. § 75.400.

After notice to the parties a hearing on the merits was held in Denver, Colorado on April 5, 1989. The parties relied on oral arguments, waived the filing of post-trial briefs and further requested a decision without receiving the transcript of the proceeding.

Summary of the Case

Order No. 2876489, issued on March 20, 1989, involved an alleged violation of 30 C.F.R. § 75.400.

The cited regulation provides as follows:

Subpart E - Combustible Materials and
Rock Dusting

§ 75.400 Accumulation of combustible
materials

[Statutory Provision]

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings or on electric equipment therein.

Order No. 2876489 states as follows:

Accumulations of coal fines (first cuttings) was permitted to accumulate along the left rib in the #1 Bleeder entry on the 9th East working section.

The accumulations were behind the line curtain installed on the left side and measured to be 104 feet 6 inches in total length and ranged between 1) 16 inches deep x 16 inches wide starting 40 feet outby the face; 2) 14 inches deep x 26 inches wide 52 feet outby the face; 3) 31 inches deep x 26 inches wide 70 feet outby the face; 4) 16 inches deep x 24 inches wide 80 feet outby the face; 5) 14 inches deep x 20 inches wide 90 feet outby the face; 6) 20 inches deep x 34 inches wide 100 feet outby the face; 7) starting 4 feet outby the face at the last row of permanent roof supports and extending outby 40 feet 3½ inches deep x 12 inches wide 4 feet outby the face; 8) 9 inches deep x 12 inches wide 20 feet outby the face; 9) 30 inches deep x 18 inches wide 35 feet outby the face.

The accumulations were damp and had "salt and pepper" amounts of rock dust from the mouth of the entry and extending inby 60 feet. The last 40 feet had not been rock dusted at all on the ribs or coal fines.

Contributing factors:

- 1) The section foreman, Bob Wilson, stated the day shift (his shift this day) on 3-17-89 had mined approximately 1½ cuts (60 feet).

- 2) The afternoon shift (swing shift) had mined the next cuts to 108 feet or 48 feet on 3-17-89.
- 3) The roof bolting machine was in the #1 entry when crew arrived on section this shift and completed installing 4½ rows of permanent roof supports.
- 4) After completing the bolting cycle, the roof bolt machine left #1 entry and went to #2 entry and the miner was observed tramping into the #1 entry.
- 5) There was no cleanup down prior to the miner entering the #1 entry or while the miner was being trammed to the face. There was no rock dusting being performed during this time.
- 6) Mr. Bob Wilson, section foreman, had done an onshift while roof bolter in #1 entry and stated "he saw the last 40 feet needed rock dusted but didn't know the last 60 feet outby behind the line curtain that bad."
- 7) The practice of cleaning first cuttings has been discussed numerous times with management by inspection personnel out of this office.
- 8) This is an obvious condition and must be cleaned and removed from the mine.
- 9) First cuttings must be cleaned after each bolting and cutting cycle.
- 10) There are only 2 working places (entries) at the present time due to the cutting of "bleeder" entries for a long-wall panel being developed.

11) This was not rib sloughage due to the fact that the ribs were straight up and down without any fractures being observed.

12) The miner is operated by radio remote from the left side. The trailing cable for the miner is also on the left side (side with accumulations) and is supplying the miner 950VAC.

Issues

The issues were whether a violation of 30 C.F.R. § 75.400 occurred; if it occurred, should the violation be designated as S & S; further, if the violation occurred was it due to the unwarrantable failure of the operator to comply with the regulation.

Stipulation

The parties stipulated as follows:

1. The Commission and the Administrative Law Judge hearing this dispute have jurisdiction to determine the issues herein.
2. Donald E. Gibson, an MSHA Inspector, was a duly authorized representative of the Secretary at the time of the inspection.
3. The Cottonwood Mine is a large coal mine.
4. Various exhibits can be admitted into evidence without further authentication.

Secretary's Evidence

RANDY TATTON, chief safety engineer for respondent at the Cottonwood mine, was familiar with the 104(d)(1) order issued in this case. He is also familiar with this section of the mine but did not observe the conditions involved in the order.

This area was developed in the continuous miner section for the purpose of advancing the longwall development entries.

There was no problem with any ribs sloughing in this area.

Mr. Tatton was questioned about certain allegations in UP&L's motion to expedite.

Mr. Tatton identified the company's cleanup plan (see Exhibit C-3). The plan was dated November 16, 1977, and was signed by the mine manager. It had been originally forwarded to MSHA on March 17, 1987. The MSHA district manager returned the plan saying it did not require his approval and he merely indicated the company should keep it on file for any MSHA inspectors who might inquire about it.

Company miners are expected to follow the plan and clean up after each cut. The first cuttings must be cleaned up as part of the mining cycle and this includes a cleanup close to the ribs. The continuous miner itself determines how close you can approach the ribs or clean up the cuttings. On the brattice side notches will be cut in the rib by the continuous miner. This increased the difficulty of a cleanup (see Exhibit C-2 showing "line curtain" printed on the exhibit).

The company had been previously advised by Mr. William Ponceroff, the local MSHA office supervisor, that the first cuttings should be cleaned up as part of the mining cycle.

The law requires that the company have a cleanup plan and they must comply with it.

Witness Tatton indicated he was familiar with a citation issued by Inspector Jones on January 6. However, the company was not cited for a violation of § 75.400 at that time. Mr. Tatton was not present and did not know the details of the Jones' citation (Jones' citation No. 3296223 was issued for a violation of § 75.316, as contained in Exhibit C-4).

The operator does its initial cleanup by sweeping along the ribs with the continuous miner.

A line curtain keeps the air out of the area of low pressure and, thus, the intake air is channeled directly to the working face. (Witness Tatton marks route of air with a red marker on Exhibit C-2; witness further marks channeling of air with a blue marker showing, by arrows, airflow if the line curtain is not installed.)

The company must maintain ventilation otherwise a violation of the ventilation plan could occur and the health and safety of the miners would be affected.

The operator has encountered burn-out areas in this section where the coal has previously burned. Such a rib condition is the worst possible situation as far as sloughage of the ribs is concerned.

The company does not want its miners exposed to any fall from the ribs.

The first cuttings occur when coal is dislodged by the mining cycle when the initial cut is made. Sloughage occurs sometimes thereafter due to pressure on the ribs.

Mr. Tatton and Inspector Gibson discussed Inspector Jones' citation for the violation of § 75.316, relating to approved ventilation. Jones cited the company because the line curtain was rolled up in order to clean behind it. On the other hand, Inspector Gibson cited the company for not cleaning the cuttings behind the curtain. It is apparent the company cannot do both. It cannot roll up the curtain (which Inspector Jones complained about) and it cannot clean the cuttings behind the curtain unless it rolls it up. It is necessary for the company to leave the line curtain intact to maintain ventilation at the face and the operator cleans the area after the next crosscut is broken through.

At the time Inspector Gibson issued his order in this case, he also read the Jones' citation but it did not have any impact on his order.

Jones' citation was written because there was insufficient air movement at the face but the citation does not say anything about rolling up the curtain.

Witness Tatton agrees that the area must be cleaned up but it is not necessary that it be done immediately. He particularly relies on paragraph 2 of the company's cleanup plan. 1/

Inspector Gibson required the company to clean up all first cuttings behind the line curtain and the company did that to the best of the capability of the continuous miner.

The company has difficulty complying because they would be violating its ventilation plan. There would be no air movement at the face.

DONALD E. GIBSON, an MSHA inspector, is a person experienced in mining as well as electrical specialist.

On March 20, 1989, Inspector Gibson was in the Cottonwood mine continuing the inspection he started on March 14, 1989.

He entered the 9 East working section and saw the condition that caused him to issue the 104(d) order. This condition involved an accumulation of coal behind the ventilation line curtain. He observed the continuous miner cutting the coal and he was present when a shuttle car tore down a section of the line curtain by the mouth of No. 2 entry (marked with a black X on Exhibit C-2).

1/ Paragraph 2 of the operator's cleanup plan provides as follows:

After the day and afternoon production mining cycles, section roadways that have been broken through will be pushed to the faces (cabs of equipment used to clean will not advance past last row of bolts). Faces that have not been broken through will be cleaned on the off curtain side. The curtain side will be cleaned after the connecting crosscut is broken through to prevent the short circuiting of the face ventilation. All cleaning of section roadways and faces other than initial cleanup with continuous miner will be done on graveyard or idle shifts. (Exhibit C-3)

The inspector did not see any rock dust applied behind the line curtain and in fact there was no rock dust for 40 feet outby the face behind the curtain. From an area 40 feet outby the face to the corner there were coal accumulations. For 40 feet outby the accumulations of coal cuttings varied in width and depth. They measured a distance of 104 feet 6 inches for a total length and ranged between 16 inches deep x 16 inches wide. The greatest accumulation was 2 feet x 34 inches. The greatest amount was at a point 65 feet outby the face. The inspector took six different measurements and the depths ranged from 14 inches to 31 inches. He estimated that the total amount of coal in the area was between 500 and 800 pounds.

When he observed the accumulations he told the company representative that "You have a (d)(1) order." The company representative was surprised.

The accumulations were measured and recorded in the order issued by Inspector Gibson. 2/

2/ The order contains the following detail:

The accumulations were behind the line curtain installed on the left side and measured to be 104 feet 6 inches in total length and ranged between 1) 16 inches deep x 16 inches wide starting 40 feet outby the face; 2) 14 inches deep x 26 inches wide 52 feet outby the face; 3) 31 inches deep x 26 inches wide 70 feet outby the face; 4) 16 inches deep x 24 inches wide 80 feet outby the face; 5) 14 inches deep x 20 inches wide 90 feet outby the face; 6) 20 inches deep x 34 inches wide 100 feet outby the face; 7) starting 4 feet outby the face at the last row of permanent roof supports and extending outby 40 feet 3½ inches deep x 12 inches wide 4 feet outby the face; 8) 9 inches deep x 12 inches wide 20 feet outby the face; 9) 30 inches deep x 18 inches wide 35 feet outby the face.

Inspector Gibson questioned the section foreman who said he had made an on-shift inspection and he had told the crew to rock dust. He said that the area behind the curtain was not that bad. The area was not listed in the on-shift book.

The company had asked Inspector Gibson to do an electrical examination on the afternoon shift and he had been in this section on March 17. Subsequently, the company rotated the shift and the foreman, Bob Wilson, stated that he had cut coal on the 17th on the day shift. He also indicated they would clean up on the down shift.

The company had in fact not cleaned up the first cuttings during the idle shift.

It took about 45 minutes to remove the accumulations and this was accomplished by using a battery-powered scoop. The company also had two men shoveling it up. When cleaning up the accumulation they were not disturbing the ventilation and there was perceptible air movement.

In the inspector's opinion it is possible to clean up the accumulations without disrupting the ventilation.

The continuous miner would back up 40 feet to 60 feet and push the cuttings to the face; then the miner could get within 6 inches to 1 foot of the left and right ribs.

The ribs were not fractured. The line curtain was 24 to 30 inches away from the rib.

Inspector Gibson was familiar with the Cottonwood cleanup plan although he did not see the plan before he issued his order. After looking at the plan he concluded it conflicted with § 75.400.

This particular entry is a bleeder entry which allows air to pass behind the gob of the longwall.

In the inspector's opinion, leaving 210 feet of coal accumulations is a violation of § 75.400. The regulation requires that accumulations be removed immediately.

The initial cleanup plan applies only to the face area and the cleanup plan violates § 75.400.

This operator had been previously cited for accumulations under \$ 75.400.

Inspector Gibson issued a 104(d)(1) order because he thought the operator had acted willfully in not removing the accumulations. In June he had previously discussed the removal of first cuttings with management and also discussed it with company representatives, Lauriska and Baker.

The company was aware of the first cuttings problem and he believed the (d)(1) order was proper because of the amount of accumulations and no attempt had been made to remove them.

The continuous miner generates sparks and it uses a trailing cable to supply its power. In the inspector's opinion, the accumulations were of a sufficient amount that an explosion could result.

The inspector also described a "salt-and-pepper" float dust condition on the accumulations. Some of the accumulations were damp, but if a fire occurs any damp coal will quickly dry out. The condition was obvious.

Inspector Gibson's order, which consists of four pages, states that the first cuttings must be cleaned after each bolting and cutting cycle. The operator can do that without violating the ventilation plan and it could be done while the roof is being bolted.

The operator can also use vent tubing to supply air to the face; other mines use that approach. It is also possible to move the line curtain to the center of the entry and use a scoop to clean the entry and then return the curtain. The ribs here are in good shape. In other parts of the mine, however, they do have problems concerning loose ribs.

The inspector did not agree with the company's claim that workers were exposed to any loose ribs; however, he understands about such conditions and he realizes any loose ribs must be supported before the area is cleaned up.

No accidents have occurred during any cleanup effort in the last two years in the Cottonwood mine.

The inspector considers this a serious violation which could affect the safety and health of the entire crew. The cuttings were generating coal dust and a 480 volt electrical roof bolter was present in the area.

The operator must have been following some type of cleanup plan because they had cleaned up the other entries.

Inspector Gibson was familiar with the MSHA policy manual which addresses clean up. The exhibit is national in scope (see page 74 and 75 of Exhibit R-3). The language of the manual indicates the operator must have a cleanup program available for inspection at the mine. The program does not permit accumulations to exist. Exhibit C-3 does not deal with accumulations as required by § 75.400. The inspector has been at the Orangeville office for two years and he has been instructed concerning accumulations since he began working at MSHA.

He has also discussed with the operator six other mines they inspect from the Orangeville office.

In the inspector's view, the violation was S & S because a violation of § 75.400 occurred. Further, there was a measure of safety involved and, in addition, it was reasonably likely that an injury could result and that such an injury would be serious. Such an injury would involve burns or even a fatality of the mining crew.

In cross-examination, the inspector agreed that the second page of the order indicates that the last 40 feet had not been rock dusted. But there is no requirement to rock dust when within 40 feet of the working face. In his order the inspector had not relied on the failure of the operator to provide rock dust within 40 feet of the face.

Section 75.400 requires accumulations to be cleaned up immediately, but immediately is not otherwise defined in the MSHA policy manual.

No mention was made of bolting and cutting cycles and the regulations are in the policy manual. But accumulations are not defined and the degree of accumulation is a judgment call.

You anticipate you will find coal in a mine and the inspector, when questioned closely, indicated that 30 pieces of coal lying together would constitute an accumulation.

The inspector believed the amount of coal accumulations involved here would fill one-third of a 14-ton shuttle car.

Exhibit R-3, page 52, discusses a cleanup program. MSHA approval is not required for a cleanup plan.

Inspector Gibson felt there was perceptible air movement. He did not take any air readings, nor did he take a methane reading.

It is apparent that the company followed something in the nature of a clean up in the area.

FORREST ADDISON, JR. is a fire boss and mine examiner for UP&L. He has been on a UMWA safety committee for three years.

On March 20, 1989, he accompanied Inspector Gibson.

Before that date he hadn't seen the company cleanup plan but he had seen the roof control and ventilation plans.

The miners were not told about the cleanup plan.

He helped the inspector measure the area of the coal cuttings and took notes. In Addison's opinion a violation of 75.400 existed since there was an excessive accumulation of coal.

The union also conducted inspections of the 9th East working section on February 24. At that time they found coal accumulations behind the curtain from the crosscut back to the tailpiece. These accumulations were behind the line curtain (see Exhibit R-4 for UMWA inspection on February 24.)

The committee reported these conditions to the company but they do not know what action the company took.

First cuttings must be cleaned up before the miners leave the area.

Mr. Addison agrees that an unwarrantable failure existed because the company should have seen the excessive coal cuttings. The operator generally removes accumulations from behind the curtain during the mining cycle and it appeared to have cleaned up along the ribs. Coal in the mining sequence is mined for 40 feet by the continuous miner (see Exhibit C-2 for numbered mining sequence printed on the exhibit).

WILLIAM PONCEROFF, supervisor of the Orangeville field office, has discussed first cuttings with company officials and particularly with upper management.

He further discussed cleaning behind the line curtain and these discussions began in 1988 when they started the two-entry system. Ponceroff recommended to the company that they keep the problem under control and the accumulations behind the curtain had virtually become nonexistent. In previous discussions the company had not mentioned their cleanup program.

The first time Mr. Ponceroff saw the operator's cleanup plan was when Inspector Gibson brought it to him after he issued his order in the instant case.

In Mr. Ponceroff's view the program does not comply with § 75.400. Inspector Jones had issued the previous citation (No. 3296223) and the company had been cited for a lack of air movement at the face. Further, he had instructed the foremen that they should clean up as they go.

Inspector Jones made it clear to the operator that it had to comply with § 75.316.

MSHA has been consistent in enforcing its policy regarding removal of first cuttings and he agreed with Gibson's order.

Mr. Ponceroff made it clear to the company that they had excessive accumulations although he had never given the company anything in writing.

UP&L's Case

JAMES BEHLING, a safety specialist for UP&L, is a person experienced in mining. He was traveling with Inspector Gibson at the time of the inspection. They initially went to the kitchen area then walked to the transformer in the face area.

Normally, the miner helper sets the drilling sites and that starts the entire mining cycle.

They checked the air, rock dust, and they usually rock dust the last 40 feet. They would then cut in the sequence printed on Exhibit C-2. They make five cuts, then clean the left side, and then back up and clean the right side.

On the left side there are gouges caused by the continuous miner because it cannot mine in a straight line. The miner cable exits on the left side of the continuous miner and, as a result, the miner cannot get close to the left rib.

Inspector Gibson saw the coal when he walked behind the line curtain. He said he was going to write a (d)(1) order.

The witness disagrees with the measurements taken by Inspector Gibson. (The witness illustrates his point in Exhibit C-5; he stated that the height and width of the first cuttings were in fact irregular.)

The witness also felt that there was more rock dust present than the 'salt-and-pepper' description given by Inspector Gibson.

The area was also wet and there was a water hole (water hole marked on Exhibit C-2 as 'water hole') which was located outby the last open crosscut.

In the witness' opinion there was no violation of § 75.400 because the cleanup plan provides how they are to clean up the area.

Supervisor Wilson, in charge of this section, told the witness he cleaned up in the best fashion he could; the graveyard shift would do the balance.

The witness asked if there was any way for the inspector to write a citation rather than an order. Inspector Gibson replied that he was going to write an order.

The witness' notes indicate that "I showed Don [Gibson] the cleanup plan and he said he was going to write the order; he made this statement as he was reviewing the plan."

Gibson wrote the order the following day at 4:00 p.m.

The witness did not agree with the S & S designation because the coal was wet and there was no problem inasmuch as they were following the cleanup plan. Accumulations would be removed when the crosscut was broken through (Exhibit C-2 at the top shows a crosscut not yet broken through and establishes its relation to the mining face.)

In addition, the witness did not agree with the unwarrantable failure feature. The section foreman was cleaning the area and the crosscut had not yet been broken through.

Inspector Gibson said the coal would have to be cleaned up before the company could proceed with its mining.

The witness asked Gibson if they could roll up the curtain although they would need acceptable air at the face.

However, in early January the company received a citation for doing the same thing, that is, rolling up the curtain.

The witness described the instability of burned areas; there are such areas in 9th East section. In the witness' opinion, no violation occurred because the company was following its cleanup plan.

The witness did not know if the crosscut (located at the top of Exhibit C-2) had been cut through as of the date of the hearing. Under the company's cleanup plan such cuttings could still be there if the succeeding crosscut had not been cut through.

Gibson also took notes during his conference.

The line curtain was 3 feet from the rib.

DIXON PEACOCK, a safety engineer for UP&L, identified Inspector Jones' citation of January 6, 1989, for the violation of § 75.316 (Exhibit C-4).

The company was in the process of cleaning the No. 1 entry when Inspector Jones tested with smoke tubes. He found there was no air moving and he stated the company had a violation.

They discussed the plan and the the violation because of a lack of perceptible movement at the face.

The maintenance crew had to roll up the brattice to facilitate the cleaning.

Inspector Jones felt this permitted the face area to be unventilated. At the time of the Jones' citation the last open crosscut had not been broken through.

The operator did not contest the Jones' citation. The last portion of the Jones' citation states as follows: "(T)he approved cleanup plan states that the curtain side of the entry will not be cleaned up until the connecting crosscut has been made."

After the Jones' citation, Peacock made certain the UP&L supervisors received a copy of the cleanup plan.

Peacock did not know how Jones had gotten a copy of the plan. Jones did not state that the plan was inadequate, ineffective or that it would have to be changed.

JOHN C. BOYLEN, JR. is the Mine Manager and responsible as head of the mine.

Witness Boylen identified the present cleanup plan. It applies throughout the mine.

Concerning paragraph 2, the company has spent \$2,000,000 for new roof bolting machines and they also use remote control miners.

Also concerning paragraph 2, the operator uses a line curtain to keeps miners away from the ribs. In this mine Mr. Boylen is more concerned about the ribs than he is about the roof.

If they shovel the area by the ribs they expose their miners to possible sloughing ribs. As a result they try to keep the people out of the area and then clean up with the continuous miner.

The company does not intend to change the cleanup plan between different sections in the mine. The ribs can become bad depending upon which section of the mine you were working in.

The ventilation tubing is an alternative to the line curtain.

Mr. Boylen worked for Consol Coal in West Virginia for 18 years where they used vent tubing because of methane and because of relatively narrow entries.

In Mr. Boylen's view line brattice is safer; the company does not use tubing.

Tubing uses a fan and the entries in the Cottonwood mine are 20 feet wide, whereas the entries as the Consol mine were 13 feet wide.

They could not use a fan because that would create turbulence. The entries are higher here. It is possible to spade the curtain while standing on the floor. MSHA has not discussed ventilation tubing with him.

They have talked to the inspectors about first cuttings and also about rock dusting the area. Mr. Boylen was familiar with the order that was issued in this case.

A letter from MSHA District Director said the company did not have to submit the cleanup plan. The particular plan, identified by the witness (Exhibit C-2), was one submitted to MSHA after the company's initial submission.

Mr. Boylen's only contact with the Jones' citation was to the effect that the company was not following the cleanup plan.

The witness did not remember discussions of accumulations behind the line curtain nor did he remember that they were discussed on June 30, 1988.

Prior to the (d)(1) order issued in this case the company was never told its cleanup plan was inadequate.

Mr. Boylen has no plans to change his cleanup plan. He did not recall discussing the plan with Mr. Ponceroff.

The witness did not go to the section before the condition was abated. He does not believe the company violated the regulation.

In Mr. Boylen's opinion they could have used the curtain to remove accumulations, but if you pull out the curtain you disrupt ventilation. To facilitate matters you could put an entire new curtain in the entry.

After the order was issued he talked to company supervisor Wilson and he required the area to be cleaned up when the connecting crosscut was put through.

The company designed its cleanup plan for a "worst case" scenario whereas the roof control plan is a "minimum case" scenario.

In rebuttal Inspector Gibson identified his notes. He also conferred the citation on the spot.

Inspector Gibson agrees with Mr. Boylen that there is a need to be consistent in the application of the cleanup plan as it relates to the condition of the ribs. In other words, if the ribs are sloughing in one area, that should be taken into account in the cleanup plan. In the inspector's view, accumulations should not be permitted to go 300 feet in length and 6 inches wide.

The inspector's measurements were taken every 10 feet behind the curtain.

Discussion

The initial issue centers on whether a violation of § 75.400 occurred. The evidence on this point is essentially uncontested. The regulation in its relative portion provides that "loose coal shall be cleaned up and not permitted to accumulate in active workings." It is apparent that the loose coal involved here was of a substantial amount. The total amount of the coal was estimated at 500 to 800 pounds. I find the inspector's opinion credible. Permitting 210 feet of coal to accumulate along the ribs constitutes a violation of § 75.400. See Old Ben Coal Company, 1 FMSHRC 1954 (1979).

The fact that some of the coal was damp because of water does not cause me to reach a different conclusion. Any fire will quickly dry out damp or wet coal. In addition, the water hole (as shown on Exhibit C-2) is a relatively small area in relation to the total area involved.

Throughout this case UP&L relied on its cleanup plan to justify its action. However, it is apparent that the cleanup plan developed pursuant to § 75.400-2 cannot overrule the mandatory duties required in § 75.400.

In short, I agree with the inspector's view that the cleanup plan is invalid to the extent it conflicts with § 75.400.

The second issue is whether the violation should be designated as significant and substantial within the meaning of the Act.

I conclude that such a designation is warranted. The credible evidence testified to by Inspector Gibson established this feature of the case within the Commission's guidelines as expressed in Mathies Coal Company, 6 FMSHRC 1 (1984) and U.S. Steel Mining Co., 6 FMSHRC 1573-74 (1984); compare Old Ben Coal Company, supra.

The final issue is whether the violation of the regulation was due to the operator's unwarrantable failure to comply.

In this connection the credible evidence establishes MSHA and the operator's upper management personnel had discussed the practice of cleaning first cuttings. In fact, the problem had been virtually nonexistent.

With this background the operator nevertheless permitted substantial coal accumulations to exist along the ribs in this active workings.

In short, the operator chose to ignore § 75.400 and to rely on its cleanup plan. It did not clean the accumulations, nor did it intend to clean them until the next connecting crosscut had been broken through.

It is obvious that a cleanup plan cannot overrule a mandatory regulation.

In its defense to the issue of unwarrantability, the operator relies on the Jones' citation and states that it is faced with the choice of (1) rolling up the line curtain and cleaning behind it and then receiving a Jones' citation for inadequate ventilation at the face; or, (2) receive a Gibson order for having accumulations behind the curtain.

The operator's defense is neither credible nor substantial. For one thing, the operator could rehang the line curtain at a point further out from the rib. In addition, the operator must have successfully met this problem before. This was the only section involved. Other sections had been cleaned. In these other areas coal accumulations were not a problem. As MSHA's witness Ponceroff indicated the problem of accumulations behind the curtain had become virtually nonexistent.

Under the operator's scenario once it started to mine the entry it would begin to accumulate coal. The accumulation would not be removed until the next open crosscut was broken through.

In Exhibit C-2 the measured distance between crosscuts is 104 feet. Under these circumstances in excess of 208 feet of loose coal would accumulate on both sides of the return entry. (The excess would be generated by the mining sequence of the continuous miner). This would be an accumulation prohibited by § 75.400.

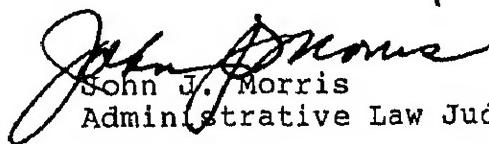
On the other hand if the circumstances are such that only the area in the return entry behind the line curtain contained loose coal then accumulations in excess of 104 feet would exist. (The excess again would be generated by the mining sequence of the continuous miner.) This amount would likewise be an accumulation prohibited by § 75.400.

The operator's decision to mine in this manner presented here constitutes an unwarrantable failure to comply with § 75.400. Further, such a failure to comply is aggravated conduct constituting more than ordinary negligence. Accordingly, the Commission doctrine expressed in Emery Mining Corporation, 9 FMSHRC 1997, 2004 (1987) is not applicable.

For the foregoing reasons I enter the following:

ORDER

The contest of Order No. 2876489 is dismissed.


John J. Morris
Administrative Law Judge

Distribution:

Susan E. Chetlin, Esq., Timothy M. Biddle, Esq., Crowell & Moring, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004
(Certified Mail)

Robert Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 418, Arlington, VA 22203
(Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

APR 26 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-89
Petitioner	:	A. C. No. 23-00465-03529
v.	:	
ASSOCIATED ELECTRIC	:	Associated Electric
COOPERATIVE INCORPORATED,	:	Cooperative Inc. - Mining
Respondent	:	Division
	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for the Secretary; Gene Andereck, Esq., Stockard, Andereck, Hauck, Sharp & Evans, Springfield, Missouri, for the Respondent.

Before: Judge Weisberger

Statement of the Case

On June 30, 1988, the Secretary (Petitioner) filed a Proposal for Penalty seeking the imposition of civil penalties for alleged violations of 30 C.F.R. § 77.205(a) and 30 C.F.R. § 77.205(b). An Answer was filed by the Operator (Respondent) on August 12, 1988. Pursuant to notice, the case was heard in Springfield, Missouri, on January 24 - 25, 1989. At the hearing, Larry Greg Maloney, Jackie Williams, Gary Ronchetto, Gary McQuitty, and Randy McQuay testified for Petitioner. Richard McClelland, Lennoth Greenwood, and Delbert Gipson testified for Respondent

The Parties each filed a Post Hearing Brief on April 10, 1989.

Stipulations:

1. Associated Electric Cooperative, Inc., is engaged in mining and selling of coal in the United States, and its mining operations affect interstate commerce.
2. Associated Electric Cooperative, Inc., is the owner and operator of Associated Electric Cooperative, Inc., Mine, MSHA I.D. No. 23-00465.
3. Associated Electric Cooperative, Inc., is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq.* ("the Act").
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of Associated Electric Cooperative, Inc., on the date and place stated herein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevance of any statements asserted therein.
6. Associated Electric Cooperative, Inc., is a large mine operator with 1,707,757 tons of production in 1987.

Citation No. 3035355

Citation

Citation No. 3035355 provides as follows:

The three crews to the Bee-veer slurry dredge were required to travel up & down the approximately 25 ft high-face to the slurry pit. The slope of the face was approximately .5 to 1 consisting of unconsolidated materials and uneven footing. A minimum of six personnel daily are required to climb the face. The catwalk had been removed since at least 2/4/88 and only about 3 hours of refabrication and welding had been performed during that duration.

Regulations

30 C.F.R. § 77.205(a) provides as follows: "Safe means of access shall be provided and maintained to all working places."

Findings of Fact and Discussion

I.

Respondent, an electrical generating cooperative, in connection with its Thomas Hill Energy Center operates a surface coal mine. As part of this operation, two employees on each of Respondent's three shifts are stationed on a dredge located in a slurry pond. The dredge, which is moved by cables, cuts coal from below the surface of the pond, and pumps a mixture of coal and water to a processing plant. The employees working on the dredge reach it by way of a rowboat from the shore. In general, these employees reach the rowboat, left at the edge of the pond by the previous shift, by traveling by vehicle to the embankment, and then walking down to the edge of the pond.

On February 10, 1988, Larry Greg Maloney, pursuant to a request made under section 103(g) of the Federal Mine Safety and Health Act of 1977 (the Act), inspected the above Bee-Veer Slurry Impoundment, and noted several sets of foot prints going up and down the bank to and from the embankment to the pond, in an area which he estimated as being at an incline of .5 to 1. He testified, in essence, that in the area where the foot prints were observed the embankment was approximately 25 feet above the level of the pond. He testified that in the area where he saw the foot prints, there was some packed snow, and described the ground material as containing loose unconsolidated granular coal. He indicated, in essence, that due to the condition of the area in which he observed the foot prints, and its slope, he did not consider it a safe access to the pond. He indicated that there was no other access to the pond. According to the uncontradicted testimony of Maloney, there was no catwalk or walkway in any area from the pond to the top of the embankment.

Lennoth Greenwood, Respondent's second shift supervisor at the Bee-Veer Slurry Impoundment, indicated that on February 10, 1988, the employees working on the dredge went from the embankment to the pond by way of a ravine, which he indicated was to the left of the access area denoted by Maloney, and then walked along the edge of the water to the rowboat. He opined that this means of access was safe. He indicated that on February 9 - 10, 1988, he observed the workers from the first shift returning from the dredge coming up the bank in the same general area as the ravine. On cross-examination, he indicated that the ravine was approximately 20 feet above the pond, at a slope of about a 30 to 45 degree angle, and that there was snow in the ravine on February 10, 1988.

Gary Ronchetto, a welder working for Respondent, who is a member of the UMWA's Safety Committee, testified on cross-examination, in essence, that on February 10, it was possible to

go from the embankment to the pond at different places, but on redirect examination indicated that he did not see any areas he considered safe as an access down to the pond. Ronchetto described the material between the embankment and the pond as a slurry made out of coal and earth and said on February 10, the bank was "slick across it" (Tr. 187).

Gary McQuitty, who was Respondent's dredge helper in January and February 1988, had the responsibility of working on the dredge on the first shift. He indicated that on February 10, 1988, he went from the top of the bank to the pond along a clay road which was "more stable than the slimy fill" (Tr. 271), and which he denoted was located at a point to the right of the areas denoted by Maloney. He indicated that during the day, if it warmed up, the frozen material on the road would thaw and become "pretty slick" (Tr. 277). He said that the top of the clay road was 20 to 25 feet above the pond and was at slope of .5 to 1. He said that in February 1988, he described the footing going down to the pond, as "extremely treacherous," that the angle of descent was "steep," and he would slip and slide to the edge of the water (Tr. 279). He said that there was no other way to get down the embankment to the pond.

I find that on February 10, 1988, access to the pond, from the embankment, was only by way of the area taken by McQuitty. I observed McQuitty's demeanor and found his testimony credible. Also, inasmuch as McQuitty's sole responsibility was working on the dredge, I place more weight on his testimony with regard to the route taken rather than the testimony of Greenwood, who had other responsibilities in addition (at times) to being on the dredge, and could not recall if he drove men out to the embankment on February 9. He also could not recall if McQuitty worked on his shift on February 9 - 10, 1988. I adopt the testimony of Maloney that, in essence, there was only one access to the pond on February 10 as, in essence, it was corroborated by Ronchetto. I adopt Maloney's testimony with regard to the hazards occasioned by the steep angle of the access areas, inasmuch as it was corroborated by Ronchetto. Also, I found persuasive, the testimony of McQuitty, who went daily from the embankment top to the pond and back, that the access was "extremely treacherous" (Tr. 279), and in February 1988, he would slip and slide going from the top to the pond. Also, although Greenwood indicated that access to the pond by way of the ravine was safe, he nonetheless characterized the slope as being between 35 to 45 degrees, and indicated that on February 10, 1988, there was snow in the ravine. For these reasons, I conclude that on February 10, 1988, there was no safe access provided from the embankment top to the

edge of the pond, where a row boat could be utilized to go to the dredge, the working site of two men per shift. As such, I find that Respondent herein has violated section 77.205(a), supra.^{1/}

II.

Taking into account the steepness of the slope of the access to the pond, as well as its slick and snow-covered condition as discussed above, I., infra, along with McQuitty's testimony that the footing was extremely treacherous, and in going up and down the slope he would slip and slide, I conclude that the violation herein contributed to the hazard of slipping and falling into the water which had been estimated by McQuitty to be 15 to 20 feet deep. Access from the embankment top to the impoundment below, is utilized daily by two miners on each of the three daily shifts going from the embankment to the pond and then returning. According to McQuitty, in the month of January 1988, Verlin Niece lost his footing going down the bank to the pond to work on the dredge, and slid into the water up to his knees and had to be pulled out.^{2/} Taking these factors into account, I conclude that

1/ In essence, it is the Respondent's position that its Board of Directors, as indicated in a safety manual provided to all employees, (R-6), that it is dedicated to operate in accord with accepted safety rules and procedures, and that its employees, in the safety manual, are specifically told not to work "near or under dangerous highwalls or banks," and that they're not permitted to walk in any area at or near a surge or storage pile while a reclaiming operation may expose them to a hazard. (R-6, 37, 41). As such, Respondent argues that any employee faced with the hazard of traveling from the embankment top to the pond, to reach a work site on the dredge, had the option of refusing to work and being exposed to a hazard pursuant to company policy. I do not find merit to Respondent's argument. It is the Respondent's responsibility to adhere to all relevant regulations. Inasmuch as the evidence establishes that Respondent failed to provide a safe means of access from the embankment top to the working area on the dredge, it must be concluded that Respondent herein violated section 77.205(a).

2/ I have adopted this testimony as there is nothing in the record to contradict it. I have taken into account the acknowledgment by Lennoth Greenwood, Respondent's second shift foreman, that prior to February 9, 1988, he did not know of any employee having fallen down the embankment. I find that the lack of knowledge on Greenwood's part does not by itself rebut McQuitty's testimony.

due to the violation herein, the hazard of an employee slipping and falling while ascending or descending the access to the impoundment, was reasonably likely to occur. McQuitty testified that the impoundment water was extremely cold, and was 15 to 20 feet deep. He also indicated that normally employees working on the dredge leave their life jackets in the rowboat, and usually wear heavy boots and coats. Accordingly, he opined that it would be difficult for one to stay afloat after falling into the impoundment. None of McQuitty's statements have been rebutted or contradicted. Accordingly, I find that, due to the hazard created herein, as consequence of the violation, there was a reasonable likelihood of the occurrence of a reasonably serious injury. Accordingly, I conclude that the violation herein was significant and substantial.^{3/} (Mathies coal Co., 6 FMSHRC 1, (January 1984)).

III.

According to Greenwood, prior to the issuance of the instant citation, he was not confronted with the specific "issue" (Tr. 345) of the difficulty of access up and down the embankment. However, McQuitty, who worked on the dredge on the first shift, indicated that on "numerous different occasions" he told management there were problems with the access (Tr. 282). Furthermore, Ronchetto indicated that, in his capacity as member of the safety committee, sometime between Christmas 1987, and January 1988, he received complaints from the dredge crew that the walkway was out, and pursuant to these complaints, told Bill King, the day shift supervisor, that the dredge crew did not have a safe access. According to Ronchetto, and corroborated by McQuitty, later that day Ronchetto called Sam Laws, superintendent to the preparation plant and slurry impoundment, and advised him that the men needed a safe access. Ronchetto indicated that Laws told him he would try to take care of it. Ronchetto said that he then confronted David Moehle who said that he would look into it. According to Ronchetto, on January 7, 1988, he looked up at the walkway along with Moehle, and described it as having a steep angle, and not having any cleats. He said that at the steep angle there was no adequate footing. Ronchetto testified that he then told Moehle that the walkway needed cleats, and Moehle said that he understood and would try to take care of it. In essence, Rochetto's testimony was corroborated by Randy McQuay, another safety committee member, who also was present.

^{3/} In reaching this conclusion, I have taken into account Respondent's evidence on this point which essentially consists of the testimony of Greenwood that the access was "safe." However, in evaluating the condition of the access, and the gravity of the violation herein, I place more weight on the testimony of Maloney and McQuitty as analyzed above, I. and II., infra.

According to McQuitty, between January and February 1988, the walkway was taken in and out continuously, and one end was so steep that ice would accumulate on it. According to McQuitty and Greenwood, the walkway had been removed approximately 4 days prior to the issuance of the citation. Some welding work was then performed on the walkway. But according to Maloney who observed it at the Preparation Plant on the date of the citation, only a quarter of its distance had steps and he indicated it did not have any cleats. This testimony does not appear to have been contradicted by Greenwood, who indicated that prior to the citation, the walkway did not have all its cleats. On February 9, 1988, at a safety committee meeting, according to Ronchetto and corroborated by McQuay, Moehle was again informed that there was no safe access, and he responded that he would look into it, and that they were still working in it.

Based on the above, I conclude that at least as early as January 7, 1988, management was made aware of the employees' complaints with regard to safe access. Indeed, Ronchetto's testimony was uncontradicted that on January 7, Moehle observed the condition, and indicated that he understood it and would try and to do something about it. Although efforts may have been made to ensure safe access by way of a walkway, the evidence indicates that when the walkway was installed it still did not provide safe access. Further, although efforts may have been made to improve the walkway, by welding material on it, I find that as of the date of the citation, February 10, Respondent had failed to install sufficient cleats to ensure safe access by way of the walkway. Thus, taking all of the above into account, I find that Respondent's conduct herein was more than ordinary negligence, and constituted aggravated conduct. As such, I conclude that the violation herein resulted from Respondent's unwarrantable failure. (See, Emery Mining Corp., 9 FMSHRC 1197 (December 1987)).

IV

Based on the factors discussed above, II., infra, I conclude that the gravity of the violation herein was relatively high. For the reason set forth above, (III., infra), I conclude that Respondent herein acted with a high degree of negligence. Taking these conclusions into account, as well as the remaining statutory factors stipulated to by the Parties, as well as the history of Respondent's violations, as contained in Government Exhibit P-1, I conclude that a penalty herein of \$500 is appropriate.

Citation No. 3035356

On February 11, 1988, Citation No. 3035356 was issued which provides as follows:

Air hoses and drop cords were lying on the floor in five locations. Machine parts, tools, hoses expanded metal and other miscellaneous materials were on the floor between six of the bay doors creating stumbling hazards.

Regulation

30 C.F.R. § 77.205(b), provides as follows:

Travel ways and platforms or other means of access to areas where persons are required to travel or work, shall be kept clear of all extraneous material and other stumbling or slipping hazards.

Findings of Fact and Discussion

I.

Respondent operates a maintenance shop which was built in approximately March 1983. The interior of the shop contains one wash bay and six work bays. Each bay has a door on each side to accommodate large pieces of equipment including 160 ton trucks that are worked on in the bays. A tire repairman, one shop laborer, one welder, and 13 mechanics work in the shop. According to Maloney, (as depicted on Government Exhibit P-3), when he inspected the premises, on February 11, 1988, he observed air hoses, drop cords, machine parts, tools, and expanded metal, at various locations on the floor. He also testified that an exit door was completely blocked by hoses. In essence, he said that in the middle of the shop where support beams were located there were tools, hoses, and drop cords, which created a safety hazard, and which he had to step over. He said that, in general, there were hoses in the area where personnel were not located.

Delbert Gipson, Respondent's truck and tractor day shift supervisor, testified that, in general, the material observed by Maloney are items utilized by the workers at the shop. Thus, he said that the air hoses are used to operate the air wrenches and blow out dirt, and the extension cords are used for the lights. He said that generally, engines that have to be repaired are left in a broken condition while awaiting parts. He was asked whether the material on the floor created any stumbling hazard and he indicated that there were probably parts mechanics laid on the floor around where they work, and that these are items that mechanics "live with every day" (Tr. 364). He indicated essentially that the material was not out of the ordinary and that "most of the material" was being used (Tr. 364). In a similar fashion Maloney agreed on cross-examination, that air hoses and chains are used in making repairs and that in small quantities expanded metal is also used in the shop.

It appears to be Respondent's position, based upon the testimony of Gipson, that no violation should be found herein inasmuch as the materials in question are either utilized by Respondent's mechanics or left in place pending receipt of the replacement parts, and that having material on the floor is part of Respondent's normal operation. I do not find merit to Respondent's argument. I note that section 77.205(b), supra, requires travel ways and platforms or other means of access to areas where persons are required to work "shall be kept clear, of . . . other stumbling or slipping hazards." Based on Maloney's testimony I find that the materials in question, located on the shop floor, were in areas where employees at the shop would have to walk to go to various work bays, and to go to the bathroom from the bays. I find Maloney's testimony credible that the materials on the floor constituted stumbling or slipping hazards, as his testimony was essentially corroborated by Jackie Williams, Respondent's mechanic who worked in the shop. In this connection, it was essentially Williams' uncontradicted testimony that there were bolts, nuts, and wheel bearings lying around and that he could hardly get around as he had to step over these materials. Indeed, he indicated that a motor that had its parts taken out, had been sitting on the floor for about a month before it was taken out by him and another employee to abate the above citation. Also, the testimony of Maloney was corroborated by Ronchetto, who also observed the conditions on February 11, and indicated he was not able to go from one place to another without going around materials and crawling over them. Also Gipson admitted on cross-examination that there were "probably" some air hoses and trouble lights "strung out" at an exit (Tr. 368, 369). Although he indicated that, in his opinion, on February 11, the accumulation of material was not too bad to walk around, nonetheless he indicated that it "probably" did need to be cleaned up (Tr. 376). Thus, I find Respondent herein violated section 77.205(b), supra.^{4/}

^{4/} I note that section 77.205(b), supra, by a plain reading of its language, does not explicitly allow for the accumulation of materials constituting a stumbling or slipping hazard if the materials accumulate in the ordinary course of the operation, or are used in the operation. To read such an exclusion into section 77.205(b), would be unduly restrictive and would render meaningless the protective intent behind this regulation. I also have considered Respondent's arguments set forth in its Post Hearing Brief. I do not find merit to these arguments, for the reasons set forth in footnote 1, infra.

II.

According to Maloney, the stumbling hazard created by the accumulation of materials could result in an injury. It was his opinion that an injury occasioned by a fall to the concrete surface could range from a bruise to a broken member. Williams indicated that he had to step over the material and he could have stepped on a ball bearing. Ronchetto indicated a stumbling, tripping, and falling hazard and opined that in falling one could hit one's head against a beam, part, or heavy equipment.

Taking into account the number of employees at the shop, the cluttered nature of the material on the floor, and the need to crawl over it, as established by Petitioner's witnesses, I find that the violation herein contributed to a discrete safety hazard of stumbling or falling. I also find, based on the these factors and taking into account the presence of tools, equipment, and beams there existed a reasonable likelihood that the hazard of stumbling or falling would result in an injury. Maloney indicated that the injury could range from a bruise to a broken member. Ronchetto indicated that a person falling could hit his head against a beam or heavy equipment. It is clear a serious injury could result, however, inasmuch as there is no evidence before me relating to any specific distance between any of the materials constituting a hazard, and any sharp or hard object, I must conclude that it has not been established that there is any reasonable likelihood that the injury resulting from the hazard of slipping or falling would be of a reasonably serious nature. Accordingly, I must conclude that it has not been established that the violation herein is significant and substantial (See, Mathis Coal Co., supra).

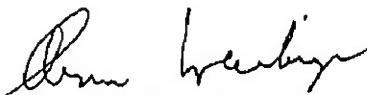
III.

According to the uncontradicted testimony of Williams, the same conditions observed on February 11, were in existence the day before, and had existed for approximately 3 weeks prior to the citation. Although Gipson indicated that in his opinion the material was not too bad to walk around, he did indicate it probably did need cleaning up on February 11. Also, it was Ronchetto's uncontradicted testimony that at a February 9, 1988, meeting at which time Moehle was present, he (Ronchetto) told Moehle that there was an accumulation of parts and hoses, and that Moehle indicated that he would try and take care of it. The extent of the accumulation of the material is indicated by the testimony of Williams that, in abating the citation, he and six or seven other employees worked the entire shift to clean up but did not finish. Based on the above, I conclude that the accumulation of material was considerable and existed for a significant

period prior to February 11, 1988, and that at least as of February 9, 1988, Respondent's management was aware of this condition. As such, I find that Respondent acted with a moderately high degree of negligence in not having the material cited by Maloney cleaned up prior to February 11. Also, as discussed above, I conclude that the violation herein was moderately serious as it could have resulted in a person stumbling and injuring himself. In assessing a penalty, I have also taken into consideration the various factors of 110(i) of the Act, and the history of violations as indicated in Government's Exhibit P-1. Taking all these factors into account, I conclude that a penalty herein of \$150 is appropriate.

ORDER

Respondent shall, within 30 days of this Decision, pay the sum of \$650 as a civil penalty for the violations found herein.



Avram Weisberger
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U. S. Department of Labor, 1585 Federal Office Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Gene Andereck, Esq., Stockard, Andereck, Hanck, Sharp & Evens, 1111 S. Glenstone, P. O. Box 4929, Springfield, MO 65808 (Certified Mail)

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 21, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 88-347-M
Petitioner	:	A. C. No. 04-04114-05511
v.	:	Calspar Mine
	:	
CALSPAR DIVISION,	:	
Respondent	:	

DECISION DISAPPROVING SETTLEMENTS
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

This case is a petition for the imposition of civil penalties for nine citations originally assessed at \$497. The Solicitor recommends substantial reductions for all the violations with the proposed settlements totaling \$248.50 As set forth herein, I am unable to approve the suggested settlements based upon the present record.

Citation Nos. 3070370, 3070371, 3070372,
3070373 and 3070377

These citations were issued for violations of 30 C.F.R. § 56.14001 because head pulleys, tail pulleys and chain and belt drives on various pieces of equipment were not guarded. Each penalty was originally assessed at \$63 and the proposed settlement for each violation is \$31.50. The inspector designated all the violations as significant and substantial and he described gravity as reasonably likely to result in permanent disability. Negligence was assessed as moderate.

The Solicitor offers no support for his proposed settlements and for his assertion "that the proposed settlement amount . . . is reasonable and will effectuate the deterrent purpose of civil money assessments for violations of the Act. . .". Without some justification I cannot approve such small penalty amounts, when the description of the violations as S & S and resulting from negligence remains unchanged. Moreover, the proposals represent 50% reductions from the original amounts which were modest to begin with.

Citation Nos. 3070375 and 3070376

These citations were issued for violations of 30 C.F.R. § 56.12032 because cover plates were not in place on two junction boxes. Each penalty was originally assessed at \$20 and the proposed settlements for each violation are \$10. The violations were designated as non-significant and substantial with gravity described as unlikely to result in lost workdays. Negligence was assessed as moderate.

The Solicitor offers no support for his proposed settlements or for his assertion "that the proposed settlement amount. . . is reasonable and will effectuate the deterrent purpose of civil money assessments for violations of the Act. . .". The \$20 single penalty assessment is the very modest amount usually imposed for non-serious violations. The Solicitor advances no reasons why these small amounts should be further reduced by half.

Citation No. 3070378

This citation was issued for a violation of 30 C.F.R. § 56.12032 because an electrical conductor leaving a fuse box was not properly bushed and that the top electrical tray of the junction box was not covered. The penalty was originally assessed at \$79 and the proposed settlement is for \$39.50. The violation is designated as significant and substantial with gravity described as reasonably likely to result in a fatality. Negligence is described as moderate.

The Solicitor offers no support for his proposed settlement or for his assertion "that the proposed settlement amount. . . is reasonable and will effectuate the deterrent purpose of civil money assessments for violations of the Act. . .". Without such support I cannot approve such a small penalty, which represents a 50% reduction from the original amount when the gravity of a projected injury is fatal and the description of it as S & S and resulting from negligence remains unchanged. Under such circumstances the original assessment appears modest indeed.

Citation No. 3070379

This citation was issued for a violation of 30 C.F.R. § 56.14003 because a multiple V-belt drive was not adequately guarded. The penalty was originally assessed at \$63 and the proposed settlement is for \$31.50. The inspector designated the violation as significant and substantial and he described gravity as reasonably likely to result in permanent disability. Negligence was assessed as moderate.

The Solicitor offers no support for his proposed settlement or for his assertion "that the proposed settlement. . . is reasonable and will effectuate the deterrent purpose of civil money assessments for violations of the Act. . .". Without some justification I cannot approve such a small penalty, when the description of the violation as S & S and resulting from negligence remains unchanged. Here too, the settlement represents a 50% reduction from the original amount, which was modest to begin with.

Discussion of Settlement Disapprovals

It is well established that penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's regulations or proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U. S. C. § 820(i). Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147, (7th Cir. 1984). Wilmot Mining Company, 9 FMSHRC 686 (April 1987). U. S. Steel, 6 FMSHRC 1148 (May 1984).

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act, 30 U. S. C. § 820(k), which provides:

(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. * * *

The legislative history makes clear Congress' intent in this respect: See S. Rep. No. 95-181, 95th Cong., 1st Sess., 44-45 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978).

In order to support his settlement recommendations, the Solicitor must present the Commission Judge with information sufficient to satisfy the six statutory criteria in section 110(i) with respect to the instant citations. I accept the Solicitor's statistics regarding history and in absence of any evidence to contrary, I accept his representations regarding good faith abatement and ability to continue in business.

As already set forth, the information furnished by the Solicitor with respect to the violations which were not single penalty assessments, indicates substantial gravity. Also, the

single penalty assessments are already low. The Solicitor cannot obtain 50% penalty reductions without supporting his request with facts and explanations. Nowhere does the Solicitor discuss the factual circumstances for the subject citations.

ORDER

In light of the foregoing, it is ORDERED that the recommended settlements be Disapproved.

It is further ORDERED that within 30 days from the date of this order, the Solicitor submit sufficient information for me to make proper settlement determinations under the Act.



Paul Merlin
Chief Administrative Law Judge

Distribution:

Felix J. Catena, Esq., Office of the Solicitor, U. S. Department of Labor, Room 3247 Federal Building, 300 North Los Angeles Street, Los Angeles, CA 90012 (Certified Mail)

Mr. Louis Ramirez, Division Manager, Calspar Division, Steelhead Resources, Inc., 12402 Los Nietos Road, Santa Fe Springs, CA 90670 (Certified Mail)

Thomas Mascolino, Esq., Counsel, Trial Litigation, Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 414, Arlington, VA 22203 (Handcarried)

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